

Cornell Law School Library

Cornell University Library
KD 720.J53 1921

v.2

A Digest of English civil law /



3 1924 021 650 605

law

This book was digitized by Microsoft Corporation in cooperation with Cornell University Library, 2008.

You may use and print this copy in limited quantity for your personal purposes, but may not distribute or provide access to it (or modified or partial versions of it) for revenue-generating or other commercial purposes.

A DIGEST OF ENGLISH CIVIL LAW
VOL. II.

A DIGEST OF ENGLISH CIVIL LAW

BY

EDWARD JENKS, M.A., B.C.L.

OF THE MIDDLE TEMPLE; PRINCIPAL AND DIRECTOR OF LEGAL STUDIES OF THE
LAW SOCIETY; FORMERLY FELLOW OF KING'S COLLEGE, CAMBRIDGE

(Editor)

W. M. GELDART, M.A., B.C.L.,
C.B.E.

OF LINCOLN'S INN; VINERIAN PROFESSOR OF
ENGLISH LAW; FELLOW OF ALL SOULS
COLLEGE, OXFORD

R. W. LEE, M.A., B.C.L.,
K.C. (Quebec)

OF GRAY'S INN; PROFESSOR OF ROMAN-
DUTCH LAW IN THE UNIVERSITY OF
OXFORD; READER IN JURISPRU-
DENCE OF THE COUNCIL OF
LEGAL EDUCATION.

W. S. HOLDSWORTH,
D.C.L., K.C.

OF LINCOLN'S INN; ALL SOULS READER IN
ENGLISH LAW; FELLOW AND ASSISTANT
TUTOR OF ST. JOHN'S COLLEGE, OXFORD;
FOREIGN ASSOCIATE OF THE ROYAL
BELGIAN ACADEMY

J. S. WILES, M.A., B.C.L.
OF THE INNER TEMPLE; FELLOW AND TUTOR
OF MERTON COLLEGE, OXFORD; LATE
SOLICITOR TO THE MINISTRY OF
LABOUR; KNIGHT BACHELOR

Barristers at Law

SECOND EDITION

VOL. II.

BOOK III.	PROPERTY (continued)
BOOK IV.	FAMILY LAW
BOOK V.	SUCCESSION

LONDON :

BUTTERWORTH & CO., BELL YARD, TEMPLE BAR.

SYDNEY :	BUTTERWORTH & CO. (AUSTRALIA), LTD.
CALCUTTA :	BUTTERWORTH & CO. (INDIA), LTD.
WINNIPEG :	BUTTERWORTH & CO. (CANADA), LTD.
WELLINGTON (N.Z.) :	BUTTERWORTH & CO. (AUSTRALIA), LTD.

1921.

THE WHITEFRIARS PRESS, LTD.
LONDON AND TONBRIDGE.

BOOK III

SECTIONS I (*continued*) AND II

PROPERTY (*continued*)

A—LAND (*continued*)

SECTION I

INTERESTS IN LAND (*continued*)

TITLE IX—(PURELY) INCORPOREAL HEREDITAMENTS

1187. A purely incorporeal hereditament is an *Purely incorporeal hereditament* interest in land of a limited and definite character, by virtue whereof the owner of such incorporeal hereditament has the right, not merely as against the occupant of the land, but as against persons generally, to do some specific act or acts on, over, or affecting such land, or to require the occupant of such land to do or refrain from doing some specific act or acts which, but for such right, the occupant of such land would be entitled to refrain from doing or to do.

[The existence of incorporeal hereditaments (sometimes called, to distinguish them from estates in expectancy, “hereditaments purely incorporeal”) was early recognized by English law; though, by reason of their ‘intangible’ character, there were difficulties with regard to their transfer which ultimately made it necessary to create

or convey them by deed of grant and not by a feoffment. But it is not very difficult, in spite of their antiquity, to indicate the origin of the more important classes of incorporeal hereditaments. Franchises (*post*, §§ 1200-1236) were the natural outcome of a feudal system in which the mesne lords were always claiming royal privileges. Easements and profits were the inevitable results of the break-up of the communal system of tillage — a process which went on from the thirteenth century to the nineteenth. Tithes (*post*, §§ 1280-1286) represent the claims of the Church to maintenance; and, according to the views of the Church, should have been matter for the ecclesiastical courts alone. In England, however, the struggle between State and Church in the twelfth century decided that they, as well as advowsons (*post*, §§ 1270-1279), should be brought within the jurisdiction of the lay courts. Rents (other than rents service, which are incidents of tenure and not incorporeal hereditaments) were one of the numerous expedients adopted to evade the strict ecclesiastical doctrine of usury. Proprietary offices (*post*, §§ 1295-1300), now rare, were, in the Middle Ages, the common method of rewarding or securing skilled service; they are classed as real property, because they were protected by remedies similar to those which protected interests in land. Peerages and ceremonial offices are matter of public law, and, though some of them bear in many respects a striking analogy to interests in land, are not really proprietary; because they have long since ceased to be transferable otherwise than by inheritance. Therefore they are not dealt with in this work.]

*No new
kinds*

1188. Only such incorporeal hereditaments as have previously been recognized by the Courts will now be recognized. A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property.

Keppell v. Bailey (1833) 2 Myl. & K., at p. 535, *per* Brougham, C.

Ackroyd v. Smith (1850) 10 C. B., at p. 188, *per Curiam*.

Hill v. Tupper (1863) 2 H. & C., at p. 127, *per* Pollock, C. B.

Sports Agency v. "Our Dogs" [1917] 2 K. B. 125.

[This doctrine, though now clearly established in theory (see, however, the remarks of Lord Herschell, C., in *Simpson v. Mayor of Godmanchester* [1896] 1 Ch., at p. 219), is, probably, not very old,

and is not always strictly observed in practice. And it must, of course, be carefully remembered, that there is no legal objection to the creation of novel *contractual* rights over land, which will, however, only bind the parties, or, at the most, on equitable principles, and then only if they are of a negative character, purchasers who acquire with notice of them, and volunteers (*post*, § 1313). It is to the creation of new proprietary burdens, available, as *jura in rem*, against all persons, with or without notice, that the law objects.]

1189. Incorporeal hereditaments (not being ad- *Interests in*
vowsons^(a)) are not the subject of tenure; and no
estates can be created in them. But —

- (i) interests analogous to estates can be created
in incorporeal hereditaments, without
technical words, in accordance with the
intention of the parties;^(b) and, generally
speaking, such interests, both as to the
construction put upon them, and the re-
spective rights and liabilities of successive
owners against or towards one another,^(c)
will be governed by the rules affecting
analogous limitations of estates;

(a) Co. Litt. 85 a.

Hartopp's and Cock's Case (1627) Hutt. 88.

(b) Co. Litt. 20 a.

Nevil's Case (1604) 7 Rep., at 33 b (tail).

Moore v. Lord Plymouth (1817) 7 Taunt. 614 (tail).

Davis v. Morgan (1825) 4 B. & C. 9 (years).

Hewlins v. Shippam (1826) 5 B. & C. 221 (fee simple).

Wood v. Leadbitter (1845) 13 M. & W., at p. 843.

Booth v. Alcock (1873) L. R. 8 Ch. App. 663 (years).

Pym v. Harrison (1876) 33 L. T. 796 (life).

McManus v. Cooke (1887) 35 Ch. D. 681 (fee simple).

Lord Dynevor v. Tennant (1888) L. R. 13 App. Ca. 279 (fee simple).

Rymer v. McLroy [1897] 1 Ch. 528 (fee simple).

Fitzgerald v. Firbank [1897] 2 Ch. 96 (years).

Grove v. Portal [1902] 1 Ch. 727 (years).

[No rent service can, however, be reserved by a subject out of an incorporeal hereditament (Co. Litt. 47). And even a contractual rent made payable on a grant for life of an incorporeal hereditament was unenforceable at common law (*ibid.*). The action of debt was extended to the latter case by the Landlord and Tenant Act, 1709, s. 4.]

- (c) The opportunities open to the limited owner of an incorporeal hereditament of committing waste at the expense of his successors in title are, from the nature of the case, small. But it is laid down by Coke (Co. Litt. 53 a) that if the "tenant" of a franchise makes an excessive use of his rights, he will be liable for waste; and though in *Moyle's Case* (n. d.) Noy, 70, it was said that destroying coney-burrows is not waste, it is generally assumed that this *dictum* does not apply to a legal warren by charter or prescription (*Lurtin v. Conn* (1850) 1 Ir. Ch. Rep., at p. 276). The rule against limiting a freehold to commence *in futuro* (*ante*, § 1173) applies to the conveyance of an existing incorporeal hereditament, though not to the creation of such a hereditament *de novo* (*Wrotesley v. Adams* (1559) Plowd. 197, *per Curiam*; *Vicars Choral of Litchfield v. Ayres* (1639) Sir W. Jones, 435.) The doctrine, countenanced by *Smartle v. Penballow* (1701) 1 Salk. 188, to the effect that, on the death of the owner of an interest *pur autre vie* in an incorporeal hereditament, no special occupant being named in the grant, the interest would come to an end, because there could not be general occupancy of an incorporeal hereditament, was definitely overruled by the Court of Common Pleas in *Bearpark v. Hutchinson* (1830) 7 Bing. 178. It is clear that such an interest can be devised under the Wills Act, 1837, s. 3. Though it seems to have been only recently that the Rule against Perpetuities has been held to apply to incorporeal hereditaments (see Gray, *Perpetuities*, §§ 314-316), there can be no doubt that it does now apply (*Edwards v. Edwards* [1909] A. C. 275), and so, presumably, does the so-called Rule against Double Possibilities (*ante*, § 1179). But it must be carefully remembered, that the Rule against Perpetuities restricts only the commencement, not the continuance, of the interest (*S. E. R. Co. v. Associated Portland* [1910] 1 Ch. 12). There seems to be no reason why the principle of Merger (*E. of Carnarvon v. Villebois* (1844) 13 M. & W. 313), and the Rule in *Shelley's Case*, should not apply to successive interests in incorporeal hereditaments; but, presumably, there can be no failure of a contingent

interest in such a subject matter, on the ground of the failure of the particular estate, because such failure cannot cause an abeyance of seisin. When an incorporeal hereditament is let by the year, or from year to year, the lessee is only entitled to reasonable notice to quit, not to six months' notice (*Lowe v. Adams* [1901] 2 Ch. 598). Easements and profits cannot, strictly, be either excepted or reserved *de novo* on a conveyance of the servient tenement; for such incorporeal hereditaments do not exist at the time of the grant, and therefore cannot be excepted, nor do they issue out of the land, therefore they cannot be reserved (Co. Litt. 47 a; *Douglas v. Lock* (1835) 2 A. & E., at p. 743). But, if the deed is executed by the grantee, such an exception or reservation may operate as a grant by him of the incorporeal hereditament (*Wickham v. Hawker* (1840) 7 M. & W., at p. 76, *per Parke, B.*; *Lord Dynewor v. Tennant* (1888) 33 Ch. D. 420).

- (ii) subject to § 1191, an incorporeal hereditament which, by act of the parties, becomes vested in the owner or occupier for the time being of the land on, over, or in respect of which it is exerciseable, in the same right as that in which he holds such land, will be extinguished or suspended for the benefit of such owner or occupier;

Litt. ss. 558-561.

Co. Litt. 313.

Nelson's Case (1585) 3 Leon. 128.

Tyringham's Case (1584) 4 Rep. 36 b.

Bradshaw v. Eyr (1597) Cro. Eliz. 570.

R. v. Hermitage (1692) Carth. 239.

James v. Plant (1836) 4 A. & E., at p. 761, *per Curiam*.

Ecclesiastical Commrs. v. Kino (1880) 14 Ch. D. 213.

Richardson v. Graham [1908] 1 K. B. 39.

[In order that the incorporeal hereditament may be extinguished, and not merely suspended, the estates of the servient owner in both tenements must be not merely in the nature of a fee simple, and in the same right, but equally "perdurable" (*R. v. Hermitage, ubi sup.* at p. 241, *per Curiam*; *Thomas v. Thomas* (1835) 2 C. M. & R.

34). And there must be no derivative estate, the enjoyment of which would be injured by the extinction (*Richardson v. Graham, ubi sup.*).]

- (iii) any real estate consisting of any interest in an incorporeal hereditament which, by reason of the death intestate and without an heir of the owner thereof, cannot be claimed by any beneficial successor, will be subject to the law of escheat, notwithstanding any devise to trustees by the late owner.

Intestates Estates Act, 1884, s. 4.

Re Wood [1896] 2 Ch. 596.

Re Bond [1901] 1 Ch. 15.

[This curious enactment declares that, in the above case, "the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments." A corporeal hereditament is an estate; and, if it is a fee simple, it passes by the law of escheat, on the death of the last purchaser and owner intestate and without heirs, to the next lord of the fee. But an incorporeal hereditament is not an estate; and, therefore, there can be no lord of it. And so, at the passing of the Act, the law of escheat could not possibly apply in such a case; even if a man who has devised to trustees can be said to die intestate. *Quære*: in the event of the death intestate and without heirs of the grantee of a perpetual rent charge issuing out of land held of a manor, would the rent charge go to the Crown or to the lord of the manor?]

\ Appendant

1190. An incorporeal hereditament is said to be 'appendant' when, by a general rule of law, the title to it is, in the absence of contrary evidence, presumed to be annexed to the enjoyment of another heredita-

ment, corporeal or incorporeal.^(a) Incorporeal hereditaments appendant cannot be created (otherwise than by Act of Parliament) at the present day.^(b)

- (a) *Case of the Hundred of C.* (1497) Y. B. 12 Hen. VII, Pasch. pl. 1.

Withers v. Iseham (1552) Dyer, 70 a.

Hill v. Grange (1556) 1 Plowd. 164.

Tyrringham's Case (1584) 4 Rep. 36 b.

Wyat Wild's Case (1609) 8 Rep. 78 b.

- (b) *Anon.* Y. B. (1534) 26 Hen. VIII, Tr. pl. 15.

Baring v. Abingdon [1892] 2 Ch., at p. 379, *per* Stirling, J.

[Reasons have been given (e. g. Scrutton, *Commons and Common Fields*, ch. II) for thinking that the technical difference between 'appendancy' and 'appurtenancy' does not date from the earliest stages of the common law; but it is clear that it can readily be traced back well into the fourteenth century (Y. BB. *Anon.* (1331) 5 Ass. pl. 9; *Anon.* (1336) 10 Edw. III, Hil. pl. 11); and Coke, though he is not very lucid on the subject (Co. Litt. 121 b, 122 a), is obviously familiar with the distinction. The practical differences between appendancy and appurtenancy are not numerous; the most important (other than that alluded to above) being that explained in § 1191. Coke seems to have thought (*loc. cit.*) that an incorporeal hereditament could not be appendant to another incorporeal hereditament. But that view is quite inconsistent with the earlier cases, and indeed with cases quoted by Coke himself in the passage referred to (e. g. *Case of the Hundred of Totcombe* (1410) Y. B. 11 Hen. IV, Trin. pl. 44, and (1412) 13 Hen. IV, Mich. pl. 28). Two other species of common are sometimes treated as resembling appendant rights, because they are not created by grant, express or implied. These are (1) 'common pur cause de vicinage,' and (2) 'common of shack.' The former is, as was said by Coke (Co. Litt. 122 a), and by Willes, C. J., in *Musgrave v. Cave* (1741) Willes, at p. 322, merely an excuse for a trespass, i. e. of cattle straying across the boundary of adjacent townships. (*Commissioners of Sewers v. Glasse* (1874) L. R. 19 Eq. at pp. 160-1.) The latter was a genuine right of pasture which was exercised over the unenclosed and intercommonable arable fields of a township by the owners between harvest and sowing. (*Sir Miles Corbet's Case* (1585) 7 Rep. 5 a; *Cheesman v. Hardman* (1818) 1 B. & Ald. 706.) There is an ancient doctrine, of which the meaning and precise application are doubtful, that an incorporeal hereditament append-

ant or appurtenant can only be claimed in respect of a principal subject with which it agrees "in nature and quality" (Co. Litt. 121 b; *Anon. Y. B.* (1336) 10 Edw. III, Hil. pl. 11; *Tyrringham's Case* (1584) 4 Rep. 36 b.).]

*Partial
extinction*

1191. When a portion only of the land over or in respect of which an incorporeal hereditament appendant is exerciseable becomes vested in the owner of such incorporeal hereditament, only so much of the incorporeal hereditament is extinguished as is proportionate to the amount of the servient tenement which has become vested in the owner of such incorporeal hereditament. This rule has no application to incorporeal hereditaments appurtenant.

Tyrringham's Case, ubi sup.
Wyat Wild's Case (1609) 8 Rep. 78 b.

*Appurte-
nant*

1192. An incorporeal hereditament is said to be "appurtenant" when, by virtue of a grant, express or implied, actual or presumed, it has been created, or is deemed to have been created, by the owner of the servient tenement, to be enjoyed as ancillary to, and along with, the enjoyment of a principal hereditament corporeal or incorporeal ("dominant tenement").

Co. Litt. 121.
Sir Henry Nevil's Case (1570) Plowd. 377.
Tyrringham's Case, ubi sup.
Sacheverill v. Porter (1637) Cro. Car. 482.
Atkyns v. Clare (1671) 1 Vent., at p. 407, *per* Hale, C. B.
Hanbury v. Jenkins [1901] 2 Ch. 401.
Staffordshire and Worcestershire Canal v. Bradley [1912] 1 Ch. 91.

1193. If a part of the dominant tenement to which an incorporeal hereditament is appendant or appurtenant is conveyed away by the owner thereof "with the appurtenances," the incorporeal hereditament, if divisible, will be apportioned; and a part thereof, proportionate to the part of the dominant tenement conveyed to him, will pass to the alienee, if the burden on the servient tenement is not increased by the division. *Apportionment*

Co. Litt. 122 a.

Anon. (n. d.) Hobart, 235.

Spooner v. Day (1636) Cro. Car. 432.

Sachewerill v. Porter, *ubi sup.*, *per Curiam*.

[*Quære*: since the passing of the Conveyancing Act, 1881, s. 6, is it necessary for this purpose to use the expression "with the appurtenances"?]

1194. The owner of a tenement cannot claim, as appurtenant to that tenement, an incorporeal hereditament wholly unconnected with the enjoyment of that tenement. *Benefit of dominant tenement*

Ackroyd v. Smith (1850) 10 C. B. 164 (easement).

Bailey v. Stephens (1862) 12 C. B. N. S. 91. } (profits).

Lord Chesterfield v. Harris [1908] 2 Ch. 397. }

Staffordshire and Worcestershire Canal v. Bradley [1912] 1 Ch. 91.

[Lord Gorell, in delivering the judgment of the majority of the House of Lords in the unsuccessful appeal of the defendant in the *Chesterfield* case ([1911] A. C. at p. 637) appeared to think that the right claimed as appurtenant must not only be connected with the enjoyment of the dominant tenement, but proportionate to the needs of such tenement. Is there not here a confusion between appendancy and appurtenancy?]

*Passing
without
words*

1195. Subject to § 1275, incorporeal hereditaments appendant and appurtenant pass by a conveyance of the dominant tenement to which they are annexed, without express words.

Co. Litt. 121 b.
Whistler's Case (1613) 10 Rep. 63 a.
Conveyancing Act, 1881, s. 6, (4).

[It should be noted, that even express general words, unless clearly to that effect (*Doidge v. Carpenter* (1817) 6 M. & S. 47), will not pass rights not in existence at the date of the conveyance — i. e. will not create such rights *de novo* (*Baring v. Abingdon* [1892] 2 Ch. 374). And by the provisions of the so-called statute *De Prærogativâ Regis* (17 Edw. II, ann. 1324) c. 17, a grant by the King of a manor, even “with the appurtenances,” does not pass knights fees, dowers, or advowsons, without express mention (*Whistler's Case*, *ubi sup.*) It was also said by the Court in *Higgins v. Grant* (1583) Cro. Eliz. 18, that a demise for years of a manor by a private person would not pass an advowson appendant; unless the words “with the appurtenances” were used.]

Severance

1196. An incorporeal hereditament appendant^(a) or appurtenant^(b) cannot (? without the consent of the owner of the servient tenement) be severed in enjoyment from the dominant tenement.

- (a) *Musgrave v. Cave* (1741) Willes, at p. 322, *per* Willes, C. J.
Ferdon v. Millward (1782) 3 Doug., at p. 73, *per* Lord Mansfield, C. J.
- (b) *Drury v. Kent* (1603) Cro. Jac. 15.
Daniel v. Hanslip (1672) 2 Lev. 67.
Johnson v. Barnes (1872) L. R. 7 C. P. 592; 8 C. P. 527.
Ormerod v. Todmorden Mill (1883) 11 Q. B. D., at p. 172, *per* Bowen, L. J.

[In the two earlier of these cases, however, the Court seemed to think, that if the right was of a character so definite that it could

not be increased, e. g. a right of common for a specific number of cattle, it might be severed from the dominant tenement; and this view was adopted by Bowen, L. J., in the case last cited. And in *Musgrave v. Cave* (1741) Willes, 319, it was actually held that a right of common appurtenant might be demised by copy apart from the manor to which it was appurtenant; whilst in *Bunn v. Channen* (1813) 5 Taunt. 243, it appeared that similar rights were in fact demised for years. An advowson appendant can be severed from the dominant tenement (Co. Litt. 122 a.)]

1197. An incorporeal hereditament is said to be *In gross* "in gross," when the enjoyment of it is unconnected with the enjoyment of any dominant or principal tenement held by the person or persons in whom such incorporeal hereditament is vested.^(a) There cannot be an easement in gross.^(b)

(a) Co. Litt. 120 b, 122 a.

Mellor v. Spateman (1669) 1 Wms. Saund. 343.

Welcome v. Upton (1840) 6 M. & W. 536.

(b) *Rangeley v. Midland Ry. Co.* (1868) L. R. 3 Ch. App. 306.

[The doctrine that 'there cannot be an easement in gross,' though it can be traced back as far as the fourteenth century (Y. B. (1347) 21 Ass. pl. 1) appears at one time to have fallen into oblivion (see, especially, Blackstone, *Comm.* III, 241; *Bailey v. Stephens* (1862) 12 C. B. N. S., at p. 111, *per* Willes, J.; *Mounsey v. Ismay* (1865) 3 H. & C., at p. 498, *per* Martin, B.). It has, however, recently been revived with great vigour; and, in its modern form, it is sometimes stated that easements are not incorporeal hereditaments at all, but mere rights appurtenant to corporeal hereditaments (*Re Brotherton* (1908) 77 L. J. Ch., at p. 59, *per* Joyce, J.). The result of the theory is that it drives the Courts to devise other titles to justify rights, of the *de facto* exercise of which there can be no doubt. Thus, rights of recreation (*Fitch v. Rawling* (1795) 2 H. Bl. 393, where the word 'easement' is freely used), rights of mooring (*A. G. v. Wright* [1897] 2 Q. B. 318), and rights of spreading nets

(*Mercer v. Denne* [1905] 2 Ch. 538) have been justified by custom or public law — titles under which it is difficult to exclude from the exercise of the rights in question any person resident in the neighborhood, or even any member of the public who may happen to be temporarily there. In very recent years, there has even been a disposition to extend the doctrine of the text to profits *à prendre*, at any rate in the absence of express grant (see the remarks of Buckley, J., in *Ramsgate Corp'n. v. Debling* (1906) 70 J. P., at p. 133). Another difficulty arises from the fact, that it has long been established, that rights in the nature of profits *à prendre* cannot be claimed by custom (*Gateward's Case* (1607) 6 Rep. 59 b; *Grinstead v. Marlowe* (1792) 4 T. R. 717; *Fitzhardinge v. Purcell* [1908] 2 Ch., at p. 163, *per* Parker, J.), otherwise than by copyholders. Here, too, the severity of the rule has led to evasion; for it has been held that profits *à prendre* (*White v. Coleman* (1673) 1 Freem. 134) and even franchises (*Cocksedge v. Fanshawe* (1779) 1 Dougl. 118, affirmed in the Lords (3 Bro. P. C. 690); *Goodman v. Mayor of Saltash* (1882) L. R. 7 App. Ca. 633) may be claimed by prescription on behalf of an unincorporated class (e. g. "inhabitants" or "free burgesses"), either through a corporation, or as a charitable trust. But in *Goodman v. Mayor of Saltash*, at p. 658, Lord Blackburn evidently thought that a profit *à prendre* in gross could be claimed by prescription.]

Extinction

1198. If the owner of an incorporeal hereditament appurtenant or in gross purchases part of the land over or in respect of which such incorporeal hereditament is exercisable, such incorporeal hereditament is extinguished.

Wyat Wild's Case (1609) 8 Rep. 78 b.

Dennett v. Pass (1834) 1 Bing. N. C. 388.

[Apparently, the only cases in which this doctrine has been applied were those of commons and rent charges. *Quære*: as to franchises and easements.]

1199. Any person in whom an incorporeal hereditament is vested, whether in present enjoyment or only in expectancy, may maintain an action for damages and an injunction against any other person who disturbs him in the exercise of his right, and thereby causes him appreciable damage in fact. *Remedies for infringement*

Blackstone, *Comm.* III, pp. 236-242.

Leverett v. Townsend (1590) Cro. Eliz. 198 (common).

Yard v. Ford (1670) 2 Wms. Saund. 172 (market).

Jesser v. Gifford (1767) 4 Burr. 2141 (reversioner) }

Kidgill v. Moor (1850) 9 C. B. 364 (") } (easements).

[Other remedies, e. g. distress, (*Leverett v. Townsend*, *ubi sup.*; *Heddy v. Wheelhouse* (1596) Cro. Eliz. 558 (franchise), *Dixon v. James* (1698) Freem. 273 (common), and abatement (*Rex v. Rosewell* (1698) 2 Salk. 499) are sometimes also available against the disturber. In some cases, no actual damage need be proved (See note to Bk. II, Pt. III, B, Sect. I, § 723, *ante*); but it is difficult to ascertain the true principle of the distinction. Even the Crown cannot grant a patent conferring a franchise which will work a disturbance of another franchise (*R. v. Butler* (1679) 2 Ventr. 344); and in some grants an express clause to that effect is inserted (2 Inst. 406). But the usual way of avoiding such a result is to hold an enquiry before granting a market or similar franchise. Such enquiry is not, however, conclusive (*R. v. Butler*, *ubi sup.*).]

FRANCHISES

1200. A franchise or liberty is a royal privilege *Franchise* which is or has been in the hands of a subject. Franchises recognized by English law are rights of jurisdiction (including the right to goods of outlaws), rights of fair, market, ferry, and toll, rights

to treasure trove, waifs, strays, wreck, free fishery, and royal fish.

Finch, *Discourse of the Law*, Bk. II, Cap. XIV.

22 & 23 Car. II (1670) c. 25, s. 2 ("royalties").

A. G. v. British Museum [1903] 2 Ch., at p. 612, *per* Farwell, J.

[Of the magnitude of the franchise question in earlier times there can be no doubt; the *Quo Warranto* proceedings of 1278-9 show that the very existence of the State was once threatened by the extent and multiplicity of these anomalous privileges. Much has subsequently been done, as will partly appear in the §§ dealing with the specific franchises, to curb the license of the feudal franchises; but that such anomalies should survive at all, is one of the strongest proofs of the conservatism of English law.]

Consideration must be shown

1201. Where the allowance of a franchise would impose a burden upon the public generally, or would be inconsistent with the existence of a public right, such franchise will not be supported by the Courts, unless a special consideration can be shown for it.

Haspurt v. Wills (1670) 1 Ventr. 71 (harbour dues).

Prideaux v. Warne (1673) Sir Thos. Raym. 232 (do.).

Mayor of Nottingham v. Lambert (1738) Wilses, 111 (toll in a navigable river).

Truman v. Walgham (1766) 2 Wils. 296 (toll on a highway).

[These were all cases of prescriptive claims. But it was said by the Court in *Pelham v. Pickersgill* (1787) 1 T. R., at p. 668, that even a grant by the Crown of a toll thorough on an ancient highway without consideration would be bad; and this doctrine goes back at least to the sixteenth century (*Werd's and Knight's Case* (1588) 1 Leon., at p. 232). In *Pelham v. Pickersgill*, it was held that a toll traverse could be claimed by prescription on proof that the toll and the soil of the highway were formerly in the same hands.]

1202. Franchises which were originally part of the royal prerogative are extinguished by reunion with the Crown; but franchises which could have no existence till created by an actual grant are not extinguished by such reunion. Merger in Crown

Abbot of Strata Marcella's Case (1591) 9 Rep., at 25 b.
The King v. Briggs (1614) 2 Bulstr., at p. 297, per Coke, C. J.

[This doctrine has a very important consequence, viz., that on the regrant by the Crown of a manor to which a franchise of the former class has been appurtenant, the franchise does not pass to the grantee, if at all, without express words; general words being insufficient for the purpose (*The King v. Capper* (1817) 5 Price, 217; *A. G. v. Marquis of Downshire* (1818) *ibid.* 269). The same distinction is also important in proof of title; for whereas franchises which were 'flowers in the garland of the Crown' can be prescribed for in the ordinary way, franchises which could not exist without express grant *de novo* can only be proved by showing such grant by the Crown, or by proof of allowance by record within the time of legal memory (*Abbot of Strata Marcella's Case*, *ubi sup.*, at ff. 27 b, 28 a; *The King v. Briggs*, *ubi sup.*, at p. 297, where franchises of the latter class are described by Coke as franchises 'in point of charter'). The doctrine has been recognized in recent times (*D. of Northumberland v. Houghton* (1870) L. R. 5 Exch., at pp. 131-2, per Martin and Pigott, BB.; *A. G. v. British Museum* [1903] 2 Ch., at p. 612, per Farwell, J.).]

1203. Any franchise may be forfeited by and to the Crown on proof of misuser^(a) or non-user^(b) by the claimant thereof; except that a franchise which exists only for the pleasure or profit of the owner may not be forfeited for mere non-user.^(c) Forfeiture

(a) *City of London v. Vanacre* (1699) 12 Mod., at p. 271, per Holt, C. J.
Curwen v. Salkeld (1803) 3 East, at p. 545, per Lord Ellenborough, C. J.

- (b) *Tottersall's Case* (1632) W. Jones, 283.
City of London v. Vanacre, ubi sup.
- (c) *Leicester Forest Case* (1607) Cro. Jac. 155, *per Coke*, C. J. (The examples given by Coke are a park and a warren.)

[The proper procedure for procuring the forfeiture of a franchise for misuser or non-user is a *Sci. Fa.* (*Islington Market Bill* (1835) 3 Cl. & F., at p. 519); for preventing the usurpation of a franchise, a *Quo Warranto* (*R. v. Stanton* (1606) Cro. Jac. 259; *City of London v. Vanacre, ubi sup.*). But, where there is an allegation of non-user, either process will be correct; for, until decision, it cannot be known whether the defendant is usurping a new right or trying to revive an old one (*Darell v. Bridge* (1749) 1 W. Bl. 46). The proper judgment in a case of *Quo Warranto* is: that the defendant be ousted of his liberty; in a case of *Sci. Fa.*, that the franchise be seised into the King's hands (*R. v. Stanton, ubi sup.*, reported as *R. v. Staverton* (1610) Yelv., at p. 192). Forfeiture for non-user may be pronounced, even if an express grant of the franchise can be proved (*Darell v. Bridge, ubi sup.*); but not where the charter, though in terms creating a right, in fact imposes a duty for the benefit of the public (*The King v. Havering-atte-Bower* (1822) 5 B. & Ald. 691). Misuser or non-user of a franchise does not entitle a private person to disturb it. (*G. E. R. v. Goldsmid* (1884) L. R. 9 App. Ca. 927).]

*Alienation of
franchise*

1204. (Semble) A franchise can be devised, assigned, or demised; ^(a) but it cannot be divided. ^(b)

- (a) *Constable's Case* (1601) 5 Rep. 106 a.
Bays v. Bird (1726) 2 P. Wms., at p. 399.
Wills Act, 1837, s. 3.
Neill v. D. of Devonshire (1882) L. R. 8 App. Ca. 135.
Goldsmid v. G. E. R. (1883) L. R. 9 App. Ca. 927. (The facts are better given in 25 Ch. D. 511.)
A. G. v. Horner (1884) 14 Q. B. D. 245.

[The older doctrine was, at least in some cases, that a franchise was not transferable (Brooke, *Abridgment*, Franchise, pl. 38; but the reference to 6 Edw. II cannot be traced); and it was said not to be devisable under the old Statute of Wills, 32 Hen. VIII (1540) c. 1. (See *dicta* in *Mounijoy v. Huntington* (1583) Godb. 17.) There

appears to be no doubt, however, that, in modern times, the rule has been the other way; though in the well-known case of the hereditary shrievalty of Westmoreland, a preamble to an Act of Parliament (13 & 14 Vic. (1850) c. 30) expressed official doubts as to the devisability of that office. Doubtless, some franchises are inseparable from the tenements to which they are appurtenant. But, even on this point, it was said by Lord Selborne, C., in *Neill v. D. of Devonshire*, *ubi sup.*, at p. 153, that the destruction of a manor to which a free fishery in a tidal river was appurtenant, by alienation of all the manor lands, would not extinguish the fishery, but leave it in gross in the hands of the alienor.]

- (b) *Mountjoy v. Huntington*, *ubi sup.*, where it was said that there could not even be partition of a franchise.

1205. The franchise of a hundred consists in the *Hundred* right to hold a hundred court or wapentake, with its incidents of the appointment of a bailiff of the hundred, return and execution of writs, and perception of fees, fines, and other profits of jurisdiction.^(a) A hundred cannot be severed from its county so as to become a franchise at the present day; at any rate as respects the powers and duties of the sheriff.^(b)

- (a) *Atkyns v. Clare* (1671) 1 Ventr., at pp. 403 *et seq.*, *per* Hale, C. B.

Bays v. Bird (1726) 2 P. Wms., at p. 399, *per* Lord King, C.

- (b) Sheriffs Act, 1887, s. 19 (1). This statute repeals the older legislation on the subject, viz. 2 Edw. III (1328) c. 12, and 14 Edw. III (1340) c. 9.

[The hundred is a very ancient territorial district, coming between the county and the vill or township. From the earliest times it has also been a unit of judicial and police administration, and, as such, a source of revenue to the authority in whose hands it is vested. Though there can be little doubt that, originally, the hundred court was merely a popular assembly ("the suitors are judges" (*Gentleman's Case* (1583) 6 Rep., at 12 a)), yet, after the Conquest, the royal officials strove, on the whole successfully, to establish the

modern theory that all the hundreds in the kingdom belong, in the absence of proof to the contrary, to the Crown (*Anon. (temp. Edw. III) Keilw. 151*). Thus the claim by a subject to the profits of a hundred became a 'franchise' in the strict sense; though the frequency with which it was asserted may be gathered, not only from the Hundred Rolls of 1275, but from such cases as *Atkyns v. Clare, ubi sup.*, where the plaintiff claimed no less than seven of the thirty hundreds in the County of Gloucester. The formal recognition of the franchise consisted in the issue to the sheriff of the writ of Non Intronnittas (*ibid.*, at p. 399); but the dangers of this recognition of feudal privilege were checked by the drastic provision of the Statute of Westminster the Second (13 Edw. I (1285) c. 39 (12)) by virtue of which, on any delay of the holder of the franchise to execute the royal process, a writ of Non Omittas might issue to the sheriff, bidding him do the work himself, notwithstanding the franchise. The jurisdictional claims of the owners of hundreds and all similar franchises were still further cut down by statute in 1535 (27 Hen. VIII, c. 24), as well as by the wholesale vesting in the Crown of the franchises belonging to dissolved religious houses. Still, it is clear that the Non Omittas was of practical, or at least technical, value, as late as the nineteenth century (*Carrett v. Smallpage* (1808) 9 East, 330; *Adams v. Osbaldeston* (1832) 3 B. & Ad. 489); though the gradual abolition by statute of private jurisdictions (e. g. by the Durham (County Palatine) Act of 1836, and the Liberties Acts of the same year and the year 1850) has tended to make the subject more and more of historical interest only. Nevertheless, express provision is made in a modern statute (Sheriffs Act, 1887, s. 34) for the conflicting powers of sheriff and lord of a hundred. The ancient civil jurisdiction of the hundred, though never formally abolished, has been, save in exceptional cases like that of Salford, practically destroyed by the effective rivalry of the modern statutory County Courts; but the possibility of its existence is still officially recognized (County Courts Act, 1888, s. 6). The administrative functions of all liberties and franchises are now vested in the county councils (Local Government Act, 1888, s. 48). The constitutional position of hundreds and other territorial franchises with regard to parliamentary elections does not fall within the scope of this work. Like the hundred, though more rarely, the greater jurisdiction of the county may have been at one time in private hands. But the last of the hereditary shrievalties was abolished in 1850 (13 & 14 Vic. c. 30); and it is long since a county palatine was vested in a subject as property.]

1206. By the grant (? devise) of a 'hundred,' land belonging to the grantor (or testator) within the territory of the hundred does not pass; but only the franchise of the hundred. *Conveyance of 'hundred'*

Bays v. Bird (1726) 2 P. Wms. 397.

1207. The lord of a hundred is not entitled, as such, to issue a deputation appointing a gamekeeper under the provisions of the Game Act, 1831, s. 14. *Deputation*

E. of Ailesbury v. Pattison (1778) 1 Dougl. 28 (decided on the corresponding section of the 22 & 23 Car. II (1670) c. 25 (s. 2)). The right belongs to the lord of a manor (*post*, § 1209).

1208. A leet is a franchise consisting of the right to hold a court of record for view of frankpledge and for the amercement of petty criminal offences, especially of breaches of the assize of bread and ale (but not of modern statutes creating similar offences), and to appoint ale-conners, burley-men, and other officials for executing the franchise. It is usually, but not necessarily, appendant to a hundred. *Leet*

Coke, 4 Inst. cap. 54.

Statute for View of Frankpledge (18 Edw. II (1325)).

8 Edw. IV (1472) c. 8.

Case of the Hundred of C. (1497) Y. B. 12 Hen. VII, Pasch. pl. 1.

D. of Bedford v. Alcock (1749) 1 Wils. 248.

Colebrook v. Elliott (1766) 3 Burr. 1859.

[Even in Coke's day (see *op. cit.*), the origin and scope of this ancient Court were much in dispute; but the better opinion is, that

it was in some way derived from the sheriff's tourn or semi-annual visitation of the hundred courts in his county, made (*inter alia*) for the purpose of seeing that the tithings were full (Magna Carta (1225) c. 35). If this view be correct, the doctrine which connects the leet with the hundred would seem to be well founded. The existence of the leet is recognized by statute so late as 1757 (31 Geo. II, c. 29, s. 43). The view of frank-pledge was a police function consisting of the duty of seeing that the tithings or securities for good behaviour created or legalized by the Ordinance of the Hundred were duly enrolled (Magna Carta, *ubi sup.*). The assize of bread and ale was a schedule of prices and qualities of those articles annually fixed under the system laid down in 1266 (51 Hen. III, st. I). Both institutions have long since disappeared; and the leet is of little, if any, practical importance at the present day. Consequently, it is unnecessary to do more than to refer to the decisions which have held, in comparatively modern times, (a) that an amercement at a leet for a private injury done to the lord is illegal, in spite of custom (*Wood v. Lovatt* (1796) 6 T. R. 511) and (b) that a custom to compel residents within the franchise to be sworn at one court and to make their presentments at the next, is likewise bad (*Davidson v. Moscrop* (1801) 2 East, 56).]

Manor

1209. A manor is a seignory or lordship, held along with demesne lands (*ante*, § 1089 n), over estates of freehold tenure, to which is incident a right to hold a court or courts for the tenants of such estates and of copyhold estates of the manor, if any (*post*, § 1211).^(a) The soil of the waste of the manor (if any) is deemed, in the absence of proof to the contrary, to be vested in the lord of the manor, subject to the rights of the tenants of the manor.^(b)

(a) Co. Litt. 57 b, 58 a.

(b) *E. of Dunraven v. Williams* (1836) 7 C. & P., at p. 332, *per Coleridge, J.*

Gery v. Redman (1875) 1 Q. B. D. 161.

1210. In addition to the incidents of forfeiture, escheat, heriots, fines, and other profits described in Title V (*ante*), the lord of a manor has, as such, the following rights, viz. : *Manorial rights*

- (i) the right, as against the freehold tenants of the manor and strangers lawfully claiming rights of pasture thereon, to enclose or approve for his own benefit any portion of the waste lands of the manor; provided that he leaves sufficient pasture to satisfy such lawful claims.^(a) But such right of enclosure or approval cannot be exercised without the consent of the Board of Agriculture.^(b) No erection of a windmill, sheep-cote, dairy, or enlarging of a court necessary, or curtilage, will be deemed to prejudice a right of common of pasture ; ^(c)

- (a) Statute of Merton (20 Hen. III (1235)) c. 4.
Statute of Westminster II (13 Edw. I (1285)) c. 46.
- (b) Law of Commons Amendment Act, 1893, s. 2.
- (c) Statute of Westminster II, *ubi sup.*

[By various statutes of the 18th and 19th centuries, of which the most important was the Inclosure Act, 1845, provision was made for obtaining Parliamentary sanction to the enclosure and allotment in severalty of manorial wastes; but later legislation (e. g. the Law of Commons Amendment Act, 1893, s. 2, and the Commons Act, 1899, s. 22), whilst not formally repealing this provision, has rendered it virtually obsolete.]

- (ii) the right to appoint and depute a game-keeper for the manor, or any division or

district thereof, and to authorize him to kill game therein ;

Game Act, 1831, s. 14.

[This right is not affected by the Game Licenses Act, 1860, ss. 6-8.]

(iii) the right to erect a dovecote on his land within the manor.

Bowlston v. Hardy (1597) Cro. Eliz., at p. 548.

[The owner of a 'reputed' manor (*ante*, § 1089, n.) is presumed to have the same franchises as the lord of a legal manor (*Soane v. Ireland* (1808) 10 East, 259).]

*Conveyance
of 'manor'*

1211. A conveyance of a legal manor will pass the demesne lands and the soil of the waste ; but by the conveyance of a reputed manor nothing but the franchise rights, if any, will pass without express words.

Darell v. Wybarne (1560) 2 Dyer, 207 b, *per* Dyer, C. J.

Doe dem. Clayton v. Williams (1843) 11 M. & W. 803.

A. G. v. Ewelme Hospital (1853) 17 Beav., at p. 386, *per* Lord Romilly, M. R.

[So far as conveyances coming into operation after 1881 are concerned, this doctrine seems to have been modified, if not overruled, by s. 6 of the Conveyancing Act, 1881, which enacts (s-s. 2) that a conveyance *inter vivos* of a manor or reputed manor shall be deemed to include all hereditaments appertaining or deemed or reputed to appertain thereto.]

*Separation
of demesnes*

1212. If the lord of a manor conveys away any part of his demesne lands in fee simple, such lands

cease to be parcel of the manor; ^(a) and, if they become re-united in such lord by re-purchase, they do not again become parcel of the manor. ^(b)

(a) *Sir Moyle Finch's Case* (1606) 6 Rep. 63 a.

Chetwode v. Crew (1746) Willes, 614.

(b) *Delacherois v. Delacherois* (1864) 11 H. L. C. 62.

1213. A court baron is a franchise which entitles *Court baron* the lord of a manor in whom it is vested to hold a court for his tenants; provided that there are at least two freehold tenants of the manor. Such franchise is presumed to be appendant to every manor.

Gentleman's Case (1583) 6 Rep. 11 b.

Rumsey v. Walton (1760)

Bradshaw v. Lawton (1791) } 4 T. R. 444.

[As in the hundred court, so in the court baron, "the free suitors are judges"; but the steward is an integral part of the court, and therefore a judicial officer (*Holroyd v. Breare* (1819) 2 B. & Ald. 473). The primary business of the court baron is to keep the records relating to the copyhold tenements of the manor, and to adjudicate upon disputes between tenants as to title. But the latter function was, despite Magna Carta (c. 34), practically abolished, so far as freehold tenants were concerned, before the end of the thirteenth century, by the fictions employed in the process of the Writ of Right, and by the Writs of Entry. On the other hand, the court baron appears, at least in some cases, to have acquired by special grant or prescription a good deal of miscellaneous civil jurisdiction, e. g. holding pleas of debt, and granting, and even trying, replevins (*Hellawell v. Eastwood* (1851) 6 Exch. 295). This jurisdiction has, however, disappeared since the establishment of the modern County Courts; and provision has been made for its formal extinction (County Courts Act, 1888, s. 6). Legal theory now distinguishes two manorial courts, viz. the court baron for the freeholders, and the court customary for the copyholders. But the court customary is not treated as a franchise.]

*Goods of
outlaws*

1214. The right to the goods of outlaws is a franchise which entitles the person in whom it is vested to the corporeal chattels movable (but not to the leaseholds or choses in action) of persons coming within the scope of the franchise who are outlawed on criminal process.

R. v. Sutton (1670) 1 Saund. 273.

The King v. Capper (1817) 5 Price, 217.

[Before 1870, the franchise frequently included the forfeitures of felons; but the forfeiture Act, 1870, s. 1, abolished forfeiture for conviction of treason and felony, and the Civil Procedure Acts Repeal Act, 1879, s. 3, abolished outlawry on civil process.]

*Fairs and
markets*

1215. A fair or market is a franchise entitling the person in whom it is vested, to the sole and exclusive right to hold, within the local limits of the franchise, at the place named in the grant, or, if no place is named, at any convenient place,^(a) a fair or market, or both (as the case may be), and to demand such tolls for the use thereof as may be permitted by the grant, from the persons resorting to such fair or market.^(b) A grant of a fair or market implies a grant of a right to hold a court of pie-powders.^(c)

(a) *Dixon v. Robinson* (1686) 3 Mod. 107.

Curwen v. Salkeld (1803) 3 East, 538.

(b) Outrageous toll is a cause of forfeiture by the Statute of Westminster the First (3 Edw. I (1275) c. 31).

(c) 17 Edw. IV (1477) c. 2; made perpetual by 1 Ric. III (1483) c. 1 (2).

4 Inst. c. 60 (where the jurisdiction of the court is described).

Howel v. Johns (1600) Cro. Eliz. 773.

Goodson v. Duffield (1612) Moo. 830.

[There seems to be no legal distinction between a market and a fair; though, doubtless, in popular idea, the latter suggests something in the nature of a holiday, and it has been judicially held, though by an evenly divided Court, that a fair can exist without buying and selling (*Collins v. Cooper* (1893) 17 Cox, 647). See, however, the *dictum* of Coke (2 Inst. 406), and *D. of Newcastle v. Worksop* [1902] 2 Ch., at p. 155.]

1216. The lord of a market may, in the absence *Site of market*
of special circumstances, move the site of the market place from one spot to another within the local limits of the franchise;^(a) provided that the new site is equally convenient to the persons resorting to the market.^(b)

(a) *Curwen v. Salkeld* (1803) 3 East, 538.

The King v. Cotterill (1827) 1 B. & Ald. 67.

(b) *R. v. Starkey* (1837) 7 A. & E. 95.

[The precise site of the market place may be prescribed in the charter "by metes and bounds"; and then, of course, no variation is possible. But such a restriction will not be presumed in a prescriptive market (*Gingell v. Stepney Borough Council* [1908] 1 K. B. 115).]

1217. The grant of a market does not of itself *No monopoly*
entitle the grantee to prohibit the sale of tollable articles in private shops within the limits of the franchise during market hours;^(a) but such a right may be acquired by prescription.^(b)

- (a) *Mayor of Macclesfield v. Chapman* (1843) 12 M. & W. 18.
- (b) *Mosley v. Walker* (1827) 7 B. & C. 40.
- Mayor of Macclesfield v. Pedley* (1833) 4 B. & Ad. 397.
- Mayor of Penryn v. Best* (1878) 3 Ex. D. 292.

Tolls

1218. A grant of a market does not of itself entitle the grantee to levy tolls for the use of the market; ^(a) but such a right may be derived from indirect expressions in the grant or from prescriptive usage. ^(b)

- (a) *Heddy v. Wheelhouse* (1596) Cro. Eliz. 558.
- Earl of Egremont v. Saul* (1837) 6 A. & E. 924.
- D. of Newcastle v. Worksop* [1902] 2 Ch. 145.
- (b) *Earl of Egremont v. Saul*, *ubi sup.*
- Lawrence v. Hitch* (1868) L. R. 3 Q. B. 521.

[The precise amount of the tolls need not be fixed by the charter. A grant of 'reasonable' toll is good (*Lawrence v. Hitch*, *ubi sup.*). Tolls must be carefully distinguished from stallage and pickage. Tolls are in the nature of dues for the use of the market; stallage and pickage are in the nature of rents for the occupation of specific plots of ground, and can, therefore, only be claimed by the owner of the soil (*R. v. Burdett* (1696) 1 Ld. Raym. 148). There was at one time a theory that all tenants in ancient demesne (*ante*, Tit. V, § 1117 n.) had certain privileges of exemption from tolls in all or some markets (2 Inst. 229; *Case of the Town of Leicester* (1586) 2 Leon. 190). But it is doubtful if such a privilege could now be enforced.]

*Disturbance
of market*

1219. Any act which amounts to a rival claim to conduct the process of selling, to the prejudice of the market, within the local limits of a market franchise, or to take the benefit of the market without paying the proper dues, whether done within the market place or not, is a disturbance of the market.

Bailiff of Tewkesbury v. Bricknell (1809) 2 Taunt. 120.

Bridgland v. Shapter (1839) 5 M. & W. 375.

Mayor of Brecon v. Edwards (1862) 1 H. & C. 51.

Goldsmid v. G. E. R. (1883) 25 Ch. D., at p. 548, *per* Lindley, L. J.

Wilcox v. Steel [1904] 1 Ch. 212.

[Needless to say, acts aiming more directly at destruction of the franchise, such as claiming to have a rival franchise, or creating an affray or riot with the object of preventing resort to the market, would equally amount to a disturbance. Many of the more important markets are at the present day governed by the provisions of the Markets and Fairs Clauses Act, 1847, and its amendments, which (*inter alia*) impose summary penalties for certain disturbances of their privileges. *Quære*: where the market in question is an entirely new market, created under the Act, are these new penalties in addition to, or substitution for, the common law action? (*Stevens v. Chown* [1901] 1 Ch. 894).]

1220. A ferry is the exclusive right of transport- *Ferry*
ing, for hire or reward, passengers or goods, or
both (as the case may be), within a certain area,
across a river or arm of the sea, by means of a
boat or other moveable structure.^(a) Such ferry
may be either from vill to vill, or from highway
to highway.^(b)

(a) *Tripp v. Frank* (1792) 4 T. R. 666 (arm of the sea).

Huzzey v. Field (1835) 2 C. M. & R., at p. 442, *per* Lord
Abinger, C. B. (arm of the sea).

Newton v. Cubitt (1862) 12 C. B. N. S., at p. 58, *per* Willes,
J. (river).

(b) *Cowes v. Southampton, &c.* [1905] 2 K. B. 287 (arm of the sea).

1221. No act is a disturbance of a ferry, unless in
substance it merely provides an alternative route

between the *termini* of the ferry.^(a) The building of a bridge is not a disturbance of a ferry; even though it clearly diverts traffic from the ferry.^(b)

(a) *Tripp v. Frank, ubi sup.*

Huzzey v. Field, ubi sup.

Newton v. Cubitt, ubi sup. (confd. on appeal, 13 C. B. N. S. 864).

Hopkins v. G. N. R. Co. (1877) 2 Q. B. D. 224.

Cowes v. Southampton, &c., ubi sup.

[These cases go to show that the owner of a ferry cannot claim to compel the public to use his ferry when a more convenient route is open to them.]

(b) *Hopkins v. G. N. R. Co., ubi sup.*

Dibdin v. Skirrow [1908] 1 Ch. 41.

[Overruling *dictum* of Blackburn, J., in *Reg. v. Cambrian Ry. Co.* (1871) L. R. 6 Q. B., at p. 430. In both the cases above quoted, the building of the bridge provided for traffic which could not have made use of the ferry. *Quære*: Was this an essential point in the defence?]

Bridge in-
stead of
ferry

1222. The owner of a ferry is not allowed to substitute a bridge for the ferry. But such an act is a public nuisance; and a person bringing an action in respect of it must prove special damage (*ante*, § 832).

Paine v. Partrich (1690) Carth. 191.

Tolls

1223. A toll thorough is a right to demand a sum certain in respect of each passenger or chattel passing along a public highway (including a bridge and a

navigable river) between certain points.^(a) A toll traverse is a right to demand a sum certain in respect of each passenger or chattel passing across the plaintiff's land.^(b) Subject to § 1201, a right of toll may be acquired by royal grant or prescription.

- (a) *Smith v. Shepherd* (1598) Cro. Eliz. 710, overruling the *dictum* of Thorp, J., in *Y. B.* (1348) 22 Ass. pl. 58, and also ruling that, notwithstanding c. 15 of the Statute of Marlbridge (1267), distress for the toll might be taken in the highway itself.
Steinson v. Heath (1693) 3 Lev. 400.
Vinkinstone v. Edden (1697) Carth. 357.
Walgham v. Key (1766) 2 Wils. 296.
- (b) *Anon.* (temp. Edw. III) Keilw. 152.
Anon. *Y. B.* (1489) 5 Hen. VII, Mich. pl. 22, *per* Fairfax, J.
James v. Johnson (1677) 1 Mod. 231.
Pelham v. Pickersgill (1787) 1 T. R. 660.

[A few other rights of a similar character are recognized by English law, e. g. for compulsory user of a mill, for which an appropriate writ (*Secta ad Molendinum*) existed in the Register (*Hix v. Gardiner* (1614) 2 Bulstr. 195), and for compulsory user of a common bakehouse (*Farmour v. Brook* (1590) reported under last case). A "turn toll" was mentioned, but not defined, in *Jehu Webb's Case* (1608) 8 Rep., at 46 b. It is said to be a toll taken in respect of each beast that goes to market and returns unsold across the claimant's land. If this view is correct, it would be merely a species of toll traverse.]

1224. The franchise of treasure trove is the right to any articles of gold or silver (including money), which have been concealed in land within the limits of the franchise, when the owner of such articles cannot be discovered. *Treasure trove*

- 3 Inst. cap. 58.
A. G. v. British Museum [1903] 2 Ch. 598.

Waif

1225. The franchise of 'waif' is the right to stolen goods abandoned by the thief flying on a charge of felony within the limits of the franchise.^(a) If the owner of the goods assists promptly in bringing the accused to justice, he can recover his goods from the lord of the franchise, and damages for any injury thereto by such lord.^(b)

(a) *Davies' Case* (1598) Cro. Eliz. 611.

Foxley's Case (1601) 5 Rep. 109 a.

(b) *Rooke v. Dennis* (1586) 2 Leon. 192.

['Waif' does not give a claim to the goods of the felon himself, though there may be a separate claim to such goods, or at any rate there might have been, before the passing of the Forfeiture Act, 1870 (*Foxley's Case*, *ubi sup.*). It seems to have been assumed (Y. B. (1473) 13 Edw. IV Pasch. pl. 5; *The King v. Hanger* (1614) 3 Bulstr., at p. 10, *per* Haughton, J.) that the *Carta Mercatoria* of 1303 (printed in Hall, *History of the Customs Revenue*, Part I, p. 202) exempted the goods of alien merchants from being claimed as waifs.]

Stray

1226. The franchise of 'stray' is the right to seize any tame beast found wandering unlawfully without apparent owner within the limits of the franchise.^(a) The owner of such beast has a right to reclaim it upon tender of reasonable expenses at any time within a year and a day of the proclamation of seizure;^(b) but, failing such claim, it then becomes the property of the lord of the franchise.^(c)

(a) Bl. *Comm.* I, 297.

[Dogs cannot be claimed as strays (Bl. *Comm.*, *ubi sup.*, at p. 298); and no fowl can be a stray except a swan (4 Inst. 280).]

- (b) *Taylor v. James* (1607) Godb. 150.
 (c) *Constable's Case* (1601) 5 Rep., at 108 b.
Anon. (n. d.) 12 Rep. 101.

[Before this time the lord of the franchise acquires no property ; and so, if the beast escapes and falls into the hands of the lord of another franchise, the lord of the first franchise has no remedy (*Harvie v. Blacklole* (1610) Brownl. 236). But if his possession is interfered with, he can sue in Trespass (*Dalton v. Barnard* (1618 Cro. Jac. 520).]

1227. The lord of a franchise who has seized a *Rights of*
 beast as stray may not, until he becomes the owner, *franchiser*
 work or injure it;^(a) but (*semble*) he may milk a
 stray cow without being accountable for the value
 of the milk.^(b)

- (a) *Bagshawe v. Goward* (1604) Cro. Jac. 147.
Harvie v. Blacklole (1610) Brownl. 236.
Pleadal v. Gosmore (1625) Winch, 124.

[And the seizer is a trespasser *ab initio* if he does (*Bagshawe v. Goward, ubi sup.*).]

- (b) *Bagshawe v. Goward, ubi sup.*, at p. 148.

[There seems at one time to have been great doubt on this point (see the cases quoted in 12 Rep. 101). But the doubt appears to have arisen from a confusion between a stray and a distress.]

1228. The franchise of 'wreck' is the right to *Wreck*
 such goods as are cast or left on land within the limits
 of the franchise by the action of the sea, as the result
 of the loss of a ship; the owner being unknown.

Such a right may be claimed by royal grant or prescription.

Constable's Case (1601) 5 Rep. 106.

Wiggan v. Branchwaite (1699) 12 Mod. 259.

Hamilton v. Davis (1771) 5 Burr. 2732.

The King v. Forty Nine Casks of Brandy (1836) 3 Hagg. Adm. 257.

[Wreck includes (a) *flotsam*, or goods which have floated away on the sinking of a ship, (b) *jetsam*, or goods thrown overboard to lighten a ship, and (c) *ligan*, or goods so thrown over and marked by a floating buoy or cork; and a grant of wreck will pass all three (*Constable's Case*, *ubi sup.*, at 106 b). Probably the Statute of Westminster I (1275), c. 4, which provided that where a man, a dog, or a cat escaped alive, nothing should be adjudged wreck, was merely explanatory of the common law. But, even if there has been a complete wreck, the owner may assert his claim (*Hamilton v. Davis*, *ubi sup.*). Derelict goods found floating are not wreck, but droits of admiralty (*The King v. Forty Nine Casks of Brandy*, *ubi sup.*). A claim, in the nature of salvage, to have an anchor and cable from any vessel cast ashore within a franchise, though not a wreck, was, after hesitation (*Geere v. Burkensham* (1682) 3 Lev. 85) ultimately allowed (*Simpson v. Bithwood* (1691) *ibid.*, 307). The owner of goods claimed as wreck has a year and a day from the seizure in which to make his claim (*Constable's Case*, *ubi sup.*, at 108 a).]

*Free
fishery*

1229. A free fishery is the exclusive right of fishing in a tidal river or an arm of the sea.^(a) It has not been lawful to create such a right, except under the provisions of an Act of Parliament, since the 6th July, 1189.^(b)

(a) *Carter v. Murcot* (1768) 4 Burr. 2162.

D. of Somerset v. Fogwell (1826) 5 B. & C. 875.

[Unless a free fishery can be established, the right of fishing in tidal waters belongs to the public generally; but the mere fact that a river is navigable does not give the public a right to fish. It is only the soil covered by the flow of the tide which is vested in the Crown, and, therefore, only over such soil that a free fishery could

have been granted (*Smith v. Andrews* [1891] 2 Ch. 678, and authorities there cited).]

- (b) *Magna Carta*, 9 Hen. III (1225) c. 16.
Weld v. Hornby (1806) 7 East, 195.

[There has been a good deal of inconsistency in the use of terms to denote fishing rights; but it is fairly clear that three distinct kinds are recognized by English law. The first is that styled a "free fishery" in this work, viz. a franchise, which must be claimed, if at all, as granted before 1189, and which consists in the exclusive right of fishing in tidal water. The second, which in this work will be called a "several fishery" (*post*, § 1261), is the exclusive right of fishing, whether as a profit *à prendre*, or a mere right of ownership, in private water. The third, in this work styled "common of piscary" (*post*, § 1263), is a true *jus in alieno solo*, exercisable by two or more persons in common in private water. It will be observed that both the first and second are exclusive rights; and there has long been a controversy as to whether their owner could bring Trespass for interference with them, or was confined to an action of Case for disturbance (see *Upton v. Dawkin* (1686) 3 Mod. 97; *Smith v. Kemp* (1693) Carth. 285). This controversy is really based on a deeper doubt, viz. as to whether the grant of an exclusive fishery passes the property in the soil. As to this point (which will be discussed later) see *Marshall v. Ulleswater Steam Navigation Co.* (1863) 3 B. & S. 732; but the presumption appears now to be clearly in the affirmative, even for a free fishery in tidal waters (*A. G. v. Emerson* [1891] A. C. 649). The owner of a several fishery in private water has, probably, one advantage which the owner of a free fishery in a tidal river has not, viz. the right to seize, as damage feasants, the boats, gear, and tackle of poachers (*Reynell v. Champernoou* (1631) Cro. Car. 228). But, if a casual expression by Hale, C. J. (*Lord Fitzwalter's Case* (1674) 1 Mod. 105) may be trusted, Trespass may be brought in respect of a free fishery as defined above.]

1230. The public have no rights of fishing in an *Inland lake* inland lake, however large, not being an arm of the sea, nor in running water forming a non-tidal river;

nor could the Crown, by virtue of the prerogative, at any time have granted a free fishery therein.

Bristow v. Cormican (1878) L. R. 3 App. Ca. 641 (overruling the doubt expressed in *Marshall v. Ulleswater Co.*, *ubi sup.*, at p. 742).
Johnson v. O' Neill [1911] A. C. 552.

*Change of
tidal river*

1231. If a tidal river totally changes its course, whether by slow degrees or suddenly, no right of free fishery which may have existed in respect of the deserted bed is transferred to the new channel.

Mayor of Carlisle v. Graham (1869) L. R. 4 Ex. 361.

Royal fish

1232. The franchise of royal fish is the right to such sturgeons, grampuses, whales, porpoises, dolphins, riggs, and graspes, and generally whatsoever other fish have in themselves great and immense size or fat, as may be cast up or driven ashore within the limits of the franchise.

Constable's Case (1601) 5 Rep. 107 a.
Cinque Ports v. The King (1831) 2 Hagg. Adm. 438.

Free warren

1233. A free warren is the right to harbour and take hares, rabbits, pheasants, partridges, and other similar beasts and birds, in their wild state, for purposes of sport, within the limits of the franchise, and to appoint a warrener to protect such game.^(a) Such

franchise may be claimed over the land of the claimant, or, by prescription, over the land of another person.^(b) Free warren is not an essential feature of a manor.^(c)

- (a) Co. Litt. 233 a.
Wadburst v. Damme (1604) Cro. Jac. 44.
Rice v. Wiseman (1615) 3 Bulstr. 82, *per* Dodderidge, J.
E. Beauchamp v. Winn (1873) L. R. 6 H. L. C., at p. 239, *per* Lord Chelmsford, C.
- (b) *Anon.* (1537) Dyer, 30 b.
A. G. v. Parsons (1832) 2 Cr. & J., at p. 302, *per* Lord Lyndhurst, C. B.
- (c) *Bowlston v. Hardy* (1597) Cro. Eliz. 547.
Morris v. Dimes (1834) 1 A. & E. 654.

[And, therefore, a right of free warren will not pass by a conveyance of a manor, even "with the appurtenances"; unless it is strictly appurtenant to the manor (*Bowlston v. Hardy*, *ubi sup.*).]

1234. By the grant (or devise) of a "free warren" (with or without description of the game therein), the ownership of the soil does not, in the absence of expression to the contrary, pass to the grantee (or devisee). *Conveyance of free warren*

E. Beauchamp v. Winn, *ubi sup.* (overruling on this point the *dicta* in *Rice v. Wiseman*, *ubi sup.*).

1235. (*Semble*) The lord of a franchise of warren has a 'qualified property' in the beasts and fowls within the warren; and can bring the action of Trover against any one who starts any of such beasts *Property in animals*

A A

or fowls in the warren, and converts them to his own use within or without the warren.

Bl. *Comm.* II, 419.

Sutton v. Moody (1697) 1 Lord Raym. 250, *per* Holt, C. J. (referred to with approval in *Blades v. Higgs* (1865) 11 H. L. C., at p. 633).

NOTE.

[In addition to the franchises dealt with above, there are a few instances, e. g. forest, chase, and park, which have a theoretical existence; but, apart from the rights of the Crown (which do not form part of the subject matter of this work) are of little (if any) practical importance. It has not, therefore, been deemed necessary to set them out in detail. For particulars, the enquirer may be referred to Manwood's classical *Treatise of the Lawes of the Forest*, first published in 1598, and to Mr. G. J. Turner's admirable *Select Pleas of the Forest* (Selden Society's Publications, Vol. XIII).]

Immunities

1236. The Crown at the time of granting a franchise, and the lord of a franchise at any time, may exempt from the operation of the franchise any person or class of persons. Such an immunity may be proved by express grant or long usage.

The King v. Hanger (1614) 3 Bulstr. 1.

Cocksedge v. Fanshawe (1779) 1 Doug. 119; 3 Bro. P. C. 703.

Lockwood v. Wood (1841) 6 Q. B. 31.

¹¹¹ *Goodman v. Mayor, &c. of Saltash* (1882) L. R. 7 App. Ca. at p. 642, *per* Lord Selborne, C.

EASEMENTS

Easement

1237. An easement is a right, of a definite and limited character,^(a) annexed to the enjoyment of a corporeal or incorporeal hereditament ("dominant

tenement"),^(b) by reason whereof the occupier of another corporeal hereditament ("servient tenement") is bound to permit the person in whom the right is for the time being vested to do something on, in, or over the servient tenement, other than taking corporeal substance,^(c) or whereby the owner or occupier of the servient tenement is bound to abstain from exercising one or more of the ordinary rights of ownership or occupation, or, in rare cases, to do something, for the benefit of the occupier of the dominant tenement.^(d) Easements recognized by English law are rights of way and water, rights of light and air, rights of support, rights of affixing chattels to land or buildings, and rights to the maintenance of fences.

(a) *Hewlins v. Shippam* (1826) 5 B. & C., at p. 229, *per* Bayly, J., quoting with approval *Termes de la Ley*.

(b) *Rangeley v. M. R. Co.* (1868) L. R. 3 Ch. App. 306 (and see *ante*, § 12, note).

Hanbury v. Jenkins [1901] 2 Ch. 401. (Could an easement be appurtenant to another easement? See *A. G. v. Copeland* [1901] 2 K. B., at p. 106.)

(c) For this purpose, water is not deemed to be a corporeal substance.

(d) *Pomfret v. Ricroft* (1669) 1 Wms. Saund., at p. 322, *per* Twysden, J.

Star v. Rookesby (1710) 1 Salk. 335.

[True easements, and, to a certain extent, even profits à prendre, must be carefully distinguished, not only from customary rights (*ante*, § 1197, n., and *post*, Tit. XII), but also from simple licenses and so-called "natural rights of property." Licenses are, properly speaking, mere permissions, and of themselves create no interest in land; though they may be coupled with such an interest (*Wood v. Leadbitter* (1845) 13 M. & W. 838). So-called "natural rights of property," such as the right of a riparian proprietor to use water flowing past or over his land, the right to dig in one's own soil, etc., are merely incidents of the larger rights of ownership or occupation;

and, though they bear some superficial resemblance to true easements, they are readily distinguishable from them. Thus, in the case of a so-called "natural right" (1) the existence of the right is presumed, and the *onus* lies on the person who denies it (*Portsmouth Waterworks Co. v. L. B. & S. C. Ry.* (1909) XXVI T. L. R., at p. 175, *per* Parker, J.) and (2) it is not extinguished by unity of possession or abandonment (*Sury v. Pigot* (1626) Poph. 166; *Wood v. Waud* (1849) 3 Exch. 775), though, of course, a recognized easement may be acquired by prescription which renders exercise of the natural right impossible. It is also important to remember, that an easement exists for the benefit of the dominant tenement; and that, therefore, the exercise of it cannot, by any length of user, give rise to a counter-easement for the benefit of the owner of adjoining land who has, in fact, profited by it (*Arkwright v. Gell* (1839) 5 M. & W. 203; *Wood v. Waud*, *ubi sup.*; *Mason v. Shrewsbury Co.* (1871) L. R. 6 Q. B. 578).]

Way

1238. A right of way is a right of passing on, through, or over ^(a) a servient tenement, from a given point to a given point, ^(b) for a definite purpose or for all purposes. ^(c) Such a right of passage may be exerciseable by means of vehicles ("cart," "carriage," or "wagon way"), horses or other animals ("bridle," "horse," "pack," or "drift way"), or on foot only ("foot way"). ^(d)

- (a) An underground right of way is familiar in practice, in connection with mining leases, and may be lateral or vertical. It is usually called a "way-leave" (*Dand v. Kingscote* (1840) 9 L. J. Ex. 279). A claim to right of aerial way has, not yet, it is believed, come before the Courts. But there seems no reason to doubt that such a right would be possible.
- (b) This, at any rate, was the old doctrine (*Alban v. Brounsall* (1609) Yelv. 163; *Rouse v. Bardin* (1790) 1 H. Bl. 353, *per* Wilson, J.). But it seems to have been held in recent years, that if the *termini* are ascertained, it is immaterial that the track is undefined; though the right to define it, in the absence of prescription, probably belongs to the grantor (*Deacon v. S. E. R. Co.* (1889) 61

- L. T. 377). This modern doctrine has, however, been questioned in a recent case by Vaughan Williams, L. J. (see *Metr. Ry. Co. v. G. W. R. Co.* (1901) 84 L. T., at p. 340).
- (c) *United Land Co. v. G. E. R. Co.* (1875) L. R. 10 Ch. App., at p. 590, *per* Mellish, L. J.
Sketchley v. Berger (1894) 69 L. T. 754.
- (d) Co. Litt. 56 a.

[To the rights of way enumerated in the text may perhaps be added that of a "smoke way," i. e. the right to pass smoke through one's neighbour's chimneys (*Jones v. Pritchard* [1909] 8 Ch. 630). It is a disturbance of an ordinary right of way to lock a gate through which the owner of the right of way must pass to exercise it; even though the person locking it offers to supply a key to the owner of the right of way (*Guests' Estates v. Milner's Safes* (1911) XXVIII T. L. R. 59). But the erection of a gate across a right of way is not necessarily a legal disturbance (*Pettey v. Parsons* [1914] 2 Ch. 653).]

1239. A "cart" or "waggon" or "carriage" *Cart way*
 way entitles the person in whom it is vested to the passage of all vehicles drawn by horses or other animals;^(a) but not to the passage of unharnessed animals,^(b) nor of foot passengers.^(c)

- (a) Even here, however, the exercise of the right may be restricted, expressly or by implication, to specific purposes (*Cowling v. Higginson* (1838) 4 M. & W. 245).
- (b) *Ballard v. Byson* (1808) 1 Taunt. 279.
- (c) *Hingham v. Rabett* (1839) 5 Bing. N. C. 623.

[*Quære*: Does such a way authorize the passage of motor vehicles or bicycles? It does not authorize the laying of rails (*Bidder v. North Staffordshire Ry. Co.* (1878) 4 Q. B. D. 412).]

1240. Neither a "bridle" way, nor a "drift" way, *Bridle, drift,*
 nor a "foot" way, entitles the person in whom it is *and foot way*

vested to use hand-carts for conveying articles along the way.

Brunton v. Hall (1841) 1 Q. B. 792.

*Extent of
right*

1241. In the case of a claim of way under an express grant, it is a question of construction for the Court,^(a) and in a claim by prescription or other implied grant, a question of fact for the jury in each case,^(b) whether the right of user of the way is limited by the needs of the occupants of the dominant tenement at the date of the inception or presumed inception of the right, or whether such right is sufficiently extensive to cover subsequent requirements. But a complete change in the character or size of the dominant tenement destroys, or at least suspends, the exercise of the right of way.^(c)

(a) *Dand v. Kingscote* (1840) 9 L. J. Ex. 279.

Allan v. Gomme (1840) 11 A. & E. 759.

Henning v. Burnet (1852) 8 Exch. 187.

Williams v. James (1867) L. R. 2 C. P., at p. 581, *per* Willes, J.

G. W. Ry. Co. v. Talbot [1902] 2 Ch. 759.

Grand Hotel v. White (1914) 84 L. J. Ch. 938 (H. L.).

[The test is what may fairly be taken to have been contemplated at the time of the grant (*G. W. Ry. Co. v. Talbot*, *ubi sup.* at p. 767).]

(b) *Williams v. James* (1867) L. R. 2 C. P. 577.

(c) *Allan v. Gomme*, *ubi sup.*

Wimbledon Conservators v. Dixon (1875) 1 Ch. D. 362.

Corporation of London v. Riggs (1880) 13 Ch. D. 798 ("way of necessity").

Harris v. Flower (1905) 74 L. J. Ch. 127.

Milner's Safe Co. v. G. N. R. Co. [1907] 1 Ch. 208.

[Unless, of course, the grant were general in its character, when the way could be used for all purposes (*South Metropolitan Cemetery Co. v. Eden* (1855) 16 C. B. 42).]

1242. The person claiming the right of way is entitled, but (*semble*) not compellable, to repair the way. The occupier of the servient tenement is not (in the absence of agreement) compellable to repair the way; and the person claiming the right of way cannot justify trespassing on adjacent land belonging to him, on the ground that the way was out of repair. *Repair of way*

Pomfret v. Ricroft (1669) 1 Wms. Saund., at p. 322, *per* Twysden, J.

Taylor v. Whitehead (1781) 2 Dougl. 745.

Jones v. Pritchard [1908] 1 Ch., at p. 638, *per* Parker, J.

[But the owner of the servient tenement may be bound by express covenant or prescription to repair; and then, if he does not, a trespass may be justified (*Henn's Case* (1632) W. Jones, 297), as it is in cases of actual obstruction by the servient owner (*Selby v. Nettlefold* (1873) L. R. 9 Ch. App. 111).]

1243. Easements of water recognized by English law are (i) the right to draw water from a natural or artificial stream, spring, or pond,^(a) (ii) the right to the uninterrupted flow of water in an artificial stream past or over the claimant's land,^(b) (iii) the right to discharge water on to a servient tenement,^(c) (iv) the right to divert or foul a natural stream or artificial watercourse,^(d) (v) the right to have water flow in *Water*

a defined channel or pipe on or under a servient tenement.^(e)

- (a) *Mason v. Hill* (1833) 5 B. & Ad. 1 (first claim).
Manning v. Wasdale (1836) 5 A. & E. 758.
Race v. Ward (1855) 4 E. & B. 702.
Watts v. Kelson (1870) L. R. 6 Ch. App. 166.
Burrows v. Lang [1901] 2 Ch. 502.
- (b) *Bealey v. Shaw* (1805) 6 East, 208.
Saunders v. Newman (1817) 1 B. & Ald. 258.
Mason v. Hill, *ubi sup.* (second claim).
Northan v. Hurley (1853) 1 E. & B. 665.

[The right, subject to the similar rights of higher riparian proprietors, to have sufficient flow of a natural stream for ordinary domestic or agricultural purposes is, of course, not an easement, but a 'natural right of property' of every riparian owner against whom a counter-easement has not been acquired (*Mason v. Shrewsbury Ry. Co.* (1871) L. R. 6 Q. B., at p. 582, *per* Blackburn, J. ; *McCartney v. Londonderry Ry. Co.* [1904] A. C. at p. 306, *per* Lord Macnaghten).]

- (c) *Thomas v. Thomas* (1835) 2 C. M. & R. 34.
Harvey v. Walters (1873) L. R. 8 C. P. 162.
Brown v. Dunstable Corporation [1899] 2 Ch. 378.
- (d) *Wright v. Williams* (1836) 1 M. & W. 77.
Beeston v. Weate (1856) 5 E. & B. 986.
Carlyon v. Lovering (1857) 1 H. & N. 784.

[It is probably as a right to divert that the anomalous right decided in *Simpson v. Mayor of Godmanchester* [1897] A. C. 696, to be an easement, can best be justified (see *per* Lord Davey, at p. 707).]

- (e) *Watts v. Kelson* (1870) L. R. 6 Ch. App. 166. (This case shows, incidentally, that the owner of such a right is entitled to enter upon the servient tenement to repair the pipe.)

Light

1244. A right of light is the right to the uninterrupted access to the claimant's windows of a certain quantity, or reasonable quantity, of light across a ser-

vient tenement.^(a) A right of air is a right to the uninterrupted access of air through an artificial channel from the servient to the dominant tenement.^(b)

- (a) The well-known decision in *Colls v. Home and Colonial Stores* [1904] A. C. 179, has laid it down that, when the claim to light is founded on prescription (*semble*, under the Prescription Act, 1832), nothing can be alleged as an interference which does not amount to an actual nuisance, i. e. nothing which leaves reasonably sufficient light for ordinary purposes. And it has since been expressly held, that even proof of special user for twenty years will not enable the claimant to get more (*Ambler v. Gordon* [1905] 1 K. B. 417). But it is believed that no decision has ruled, that an exceptional quantity of light cannot be secured by express, or, even, presumably, by implied grant or prescription at common law. (But see remarks of Mellish, L. J., in *Kelk v. Pearson* (1871) L. R. 6 Ch. App., at p. 813, highly approved of in *Colls v. Home and Colonial Stores*, and of Parker, J., in *Browne v. Flower* [1911] 1 Ch., at p. 226). As to what is a "reasonable" amount of light, see the remarks of the learned lords in the *Colls* case on the "forty-five degrees rule." Probably there can be no right to light in respect of land uncovered by buildings, at any rate by prescription (*Roberts v. Macord* (1832) 1 Moo. & R. 230).

- (b) The claim of air was at one time usually brought in connection with the claim of light; but no mention of air was made in the injunction (*Bryant v. Lefever* (1879) 4 C. P. D. 172). It was, however, hinted in that case, as well as in *Harris v. De Pimm* (1886) 33 Ch. D., at p. 250, and actually decided in *Cable v. Bryant* [1908] 1 Ch. 259, that a right to the access of air through a particular aperture may be acquired as an easement.

1245. The fact that the owner of a dominant tenement pulls down or alters the building with a view to re-construction,^(a) or changes the purposes to which it is put, does not destroy his right to light.^(b) Re-building

- (a) *Staight v. Burn* (1869) L. R. 5 Ch. 163.
Ecclesiastical Commrs. v. Kino (1880) 14 Ch. D. 213.
Andrews v. Wait [1907] 2 Ch. 500.
 (b) *Ecclesiastical Commrs. v. Kino*, *ubi sup.*

[Of course, the alteration in the building or user cannot in law increase or alter the burden on the servient tenement (*Ankerson v. Connelly* [1907] 1 Ch. 678). But, in fact, it may be very difficult for the servient owner to obstruct enlarged or new windows without obstructing the old light. And a plaintiff whose lights have been obstructed is entitled, in the assessment of damages, to have it taken into account that he is owner of adjoining land which would enable him to erect a larger or better building (*Griffith v. Clay* [1912] 1 Ch. 291).]

*Alternative
lights*

1246. The fact that, owing to the acts of other persons, the dominant tenement will, notwithstanding obstruction by the servient owner, receive as much light as before the obstruction, is no answer to a claim for obstruction; at any rate if the new light is not legally secured to the dominant tenement.

Dyers' Co. v. King (1870) L. R. 9 Eq. 438.

Colls v. Home and Colonial Stores [1904] A. C., at p. 211, *per* Lord Lindley.

[But, if the new light cannot be obstructed, its existence is important in determining whether the claimant's light is *de facto* reduced beyond a reasonable limit (*Dyers' Co. v. King*, *ubi sup.*, at p. 442, *per* James, V. C.). And, *semble*, if the substituted light is produced by the defendant's acts, it is an answer to the claim (*Davis v. Marrable* [1913] 2 Ch. 421).]

*No rights of
prospect or
privacy*

1247. Neither a right of prospect, nor a right of privacy, is recognized by English law as an easement.^(a) But if a prospect is obstructed by an act which also amounts to a nuisance, special damages may be awarded for the obstruction of the prospect.^(b)

(a) *Browne v. Flower* [1911] 1 Ch., at p. 225, *per* Parker, J.

(b) *Campbell v. Paddington Borough Council* [1911] 1 K. B. 869.

1248. Rights of support recognized as easements *Support* by English law are (i) right to the support of buildings by subjacent or adjacent land,^(a) (ii) right to the support of buildings by subjacent or adjacent buildings.^(b)

- (a) *Palmer v. Fleshees* (1663) 1 Sid. 167.
Dalton v. Angus (1881) L. R. 6 App. Ca. 740.
Union Lighterage Co. v. London Graving Dock Co. [1902] 2 Ch. 557.

[The right to support of land by subjacent or adjacent land is a 'natural right of property.' But a right to support of buildings is a true easement (*Wilde v. Minsterley* (1639) 1 Rolle, Ab. 565).]

- (b) *Richards v. Rose* (1853) 9 Exch. 218.
Caledonian Ry. Co. v. Sprot (1856) 2 Macq. 499 (approved in *Dalton v. Angus*, *ubi sup.*, at p. 793, *per* Lord Selborne, C.).

[In *Solomon v. Vintners' Co.* (1859) 4 H. & N. 585, it was said, that no action would lie against the person who caused the fall by pulling down a house not next to the plaintiff's, but separated from it by a third house. *Sed quære.*]

1249. An easement consisting of the right to *Right to rest* place or fix chattels belonging to the owner of *chattels* the dominant tenement upon the soil^(a) or buildings^(b) of a servient owner is recognized by English law.

- (a) *Wood v. Hewett* (1846) 8 Q. B. 913.
Lancaster v. Eve (1859) 5 C. B. (N. S.) 717.
Hoare v. Metr. B. of Works (1874) L. R. 9 Q. B. 296.
(b) *Hawkins v. Wallis* (1763) 2 Wils. K. B. 173.
Gray v. Bond (1821) 2 Brod. & B. 667.
Moody v. Steggles (1879) 12 Ch. D. 261.
Francis v. Heyward (1882) 22 Ch. D., at p. 182, *per* Bowen, L. J.

*Right of
overhanging*

1250. A right of projection is a right to cause buildings or chattels to project or be suspended over the servient tenement, for the benefit of the owner of the dominant tenement.^(a) Such a right cannot be acquired by prescription in respect of projecting trees.^(b)

- (a) *Drewell v. Towler* (1832) 3 B. & Ad. 735.
Suffield v. Brown (1863) 33 L. J. Ch. 249.
Lemmon v. Webb (1894) 3 Ch., at p. 11, *per* Lindley, L. J.
 (b) *Lemmon v. Webb*, *ubi sup.*

[And an action will lie against the owner of trees who allows them to overhang his neighbour's land to the damage of the latter's crops (*Smith v. Giddy* [1904] 2 K. B. 448).]

*Duty of
repairing
fence*

1251. The owner of one tenement may be bound by grant or prescription to repair a fence or hedge between his land and a neighbouring tenement, for the benefit of the owners and occupiers of such neighbouring tenement.

- Star v. Rookesby* (1710) 1 Salk. 335.
Boyle v. Tamlyn (1827) 6 B. & C. 329.
Lawrence v. Jenkins (1873) L. R. 8 Q. B. 274.
Coaker v. Willcocks [1911] 1 K. B. 649.

PROFITS À PRENDRE

*Profit à
prendre*

1252. A *profit à prendre* is a right to take some definite part of the profits of the soil from or off the land of another person.^(a) For this purpose, "profits of the soil" include herbage and natural vesture or produce of the soil, stone, sand, gravel, and other

minerals, fish, turves or peat, wood, and game; but not crops produced by human labour, or manufactured produce.^(b)

- (a) *Manning v. Wasdale* (1836) 5 A. & E., at p. 764, *per* Patteson, J.
Webber v. Lee (1882) 9 Q. B. D. 315.
D. of Sutherland v. Heathcote (1892) 1 Ch., at p. 484, *per* Lindley, L. J.
Lord Fitzhardinge v. Purcell [1908] 2 Ch., at p. 163, *per* Parker, J.
The King v. Surrey [1910] 2 K. B. 410.
- (b) *Smart v. Jones* (1864) 15 C. B. N. S. 717 (where a right to dig and take away cinders was held not to be an interest in land).
 But a grant of *sola vestura* includes crops (Co. Litt. 4 b).

[There seems to be no reason to doubt that a claim to gather oysters *in alieno solo* could be established as a profit *à prendre*; even though the oysters were artificially cultivated.]

1253. Rights to the vesture of the soil include *Vesture* rights of cutting and taking away heather and litter,^(a) sticks,^(b) rushes,^(c) thorns,^(d) and grass.^(e) By a grant of the "vesture" itself, all such rights will pass to the grantee, as well as the crops growing on the land.^(f)

- (a) *Earl de la Warr v. Miles* (1880) 17 Ch. D. 535.
- (b) *Chilton v. Corp'n. of London* (1878) 7 Ch. D. 735.
Lord Rivers v. Adams (1878) 3 Ex. D. 361.
- (c) *Bean v. Bloom* (1773) 2 W. Bl. 926.
- (d) *Douglas v. Kendall* (1609) Cro. Jac. 256.
- (e) *Crosby v. Wadsworth* (1805) 6 East, 602.
- (f) Co. Litt. 4 b.

[At one time it seems to have been thought, that such a grant passed the property in the soil itself. But this view was overruled (*Tenants of Owning's Case* (1587) 4 Leon. 43; *Anon.* (1588) Owen, 37). See, however, the *dicta* to the contrary in *Bishop of Oxford's Case* (1621) Palm. 174. There may also be a grant of "first vesture" (*Bishop of Oxford's Case*, *ubi sup.*).]

Pasture

1254. Rights of pasture are either (i) several pasture,^(a) or (ii) common of pasture.^(b)

(a) Co. Litt. 4 a.

(b) *Ibid.* 122 a.

Several
pasture

1255. Several pasture is the exclusive right to take the herbage of the servient tenement by the mouths of cattle or other beasts.^(a) A grant of a several pasture does not of itself operate as a grant of the soil.^(b)

(a) *Sir George Sparke's Case* (1621) Winch, 6.

Potter v. North (1669) 1 Wms. Saund. 346.

Johnson v. Barnes (1873) L. R. 8 C. P. 527.

Robinson v. Duleep Singh (1878) 11 Ch. D., at p. 805, *per* Fry, J.

[The owner of a several pasture may bring Trespass, i. e. no proof of actual damage is necessary (*Robinson v. Duleep Singh*, *ubi sup.*, at p. 813, *per* James, L. J.). He may also bring Ejectment (*Ward v. Petifer* (1634) Cro. Car. 362).]

(b) Co. Litt. 4 a.

Lord Chesterfield v. Harris [1908] 2 Ch., at p. 423, *per* Buckley, L. J.

[The language of Lord Kenyon in *Burt v. Moore* (1793) 5 T. R., at p. 333, may seem to be somewhat inconsistent with this doctrine. But the facts in that case were peculiar; and Coke's assertion is not seriously questioned.]

Common of
pasture

1256. Common of pasture is the right to take, in common with the owner of the servient tenement, and with or without other persons, the herbage of the servient tenement by the mouths of cattle or other beasts.^(a) Such a right may be for a limited

(“stinted common”) or unlimited number of beasts (“common *sans nombre*”),^(b) or for a particular class or classes of beasts;^(c) but common of pasture appendant or appurtenant cannot be *sans nombre*.^(d)

(a) Co. Litt. 122 a.

(b) *Richards v. Squibb* (1698) 1 Ld. Raym. 726.

Brook v. Willet (1793) 2 H. Bl. 224.

(c) *Jones v. Richard* (1837) 6 A. & E. 530.

(d) *Bennett v. Reeve* (1740) Willes, 227.

Benson v. Chester (1799) 8 T. R. 396.

Baylis v. Tyssen-Amberst (1877) 6 Ch. D., at p. 507, *per* Jessel, M. R.

[The cases in which common *sans nombre* has been allowed in respect of appendant or appurtenant rights, are to be explained by assuming that, in such cases, common *sans nombre* merely means common for all commonable beasts *levant and couchant* (i. e. such a number as can be maintained in the winter) on the dominant tenement. (*Chichly's Case* (1658) Hardr. 117; *Morley v. Clifford* (1882) 20 Ch. D., at p. 757, *per* Fry, J.). By “maintained in the winter” is meant being fed during the winter on the food produced by the dominant tenement during the summer (*Robertson v. Hartopp* (1889) 43 Ch. D., at p. 516, *per Curiam*). In *Mellor v. Spateman* (1669) 1 Wms. Saund. 343, it was held, that even common in gross could not be *sans nombre*; but this doctrine seems not to have been followed (see *Weekly v. Wildman* (1698) 1 Ld. Raym., at p. 407, *per* Powel, J.).]

1257. A right of pannage or pawnage is a right *Pannage* to take the droppings of oak, beech, and other trees growing on the servient tenement, by the mouths of hogs or swine.

Chilton v. Corporation of London (1878) 7 Ch. D., at p. 565, *per* Jessel, M. R.

[The existence of this right does not prevent the owner of the trees lopping them, or even cutting them down when ripe (*Chilton v. Corporation of London*, *ubi sup.*).]

Foldage

1258. A right of foldage is a right to have all or some of the sheep belonging to the owner of the servient tenement folded on the dominant tenement.

Anon. Y. B. (1486) 1 Hen. VII, Pasch. pl. 17.

Anon. Y. B. (1489) 5 Hen. VII, Mich. pl. 22.

Dickman v. Allen (1690) 2 Vent. 138.

Brook v. Willet (1793) 2 H. Bl. 224.

[This right is not infrequently confused with the right of *fold-course*, which is simply an instance of common of pasture for a certain number, or unlimited number, of sheep (*Dickman v. Allen*, *ubi sup.*; *Robinson v. Duleep Singh* (1878) 11 Ch. D. 798). In the case in 1 Hen. VII, it was suggested that there could be no right of foldage in gross; because the whole object of the right was to improve the land of the owner of the right. But the point was not decided. It appears from *Brook v. Willet*, *ubi sup.*, that the right may exist as a condition of a right of common of pasture.]

Mineral rights

1259. Rights to minerals include the common or exclusive right^(a) of digging or quarrying for stone,^(b) clay,^(c) gravel,^(d) sand,^(e) coal,^(f) and other minerals, in or under the servient tenement.

(a) It may be questioned whether a claim which virtually asserted the right to destroy the servient tenement would be good, at any rate by prescription (*Clayton v. Gorbey* (1843) 5 Q. B. 415; *Hilton v. Granville* (1844) *ibid.* 716). But see *M. of Salisbury v. Gladstone* (1860) 6 H. & N. 123, which was, however, a claim by copyholders. It will be realized, that a claim may be limited, and yet exclusive (*D. of Sutherland v. Heathcote* [1892] 1 Ch., at p. 484.)

(b) *Maxwell v. Martin* (1830) 6 Bing. 522.

Constable v. Nicholson (1863) 14 C. B. N. S. 230.

(c) *M. of Salisbury v. Gladstone* (1860) 6 H. & N. 123.

(d) *Duberley v. Page* (1788) 2 T. R. 391.

(e) *Duberley v. Page*, *ubi sup.*

Blewett v. Tregonning (1835) 3 A. & E. 554.

(f) Co. Litt. 122 a.

Shuttleworth v. Le Fleming (1865) 19 C. B. N. S., at p. 709, *per Curiam*.

[It must be carefully noted, that the *ownership* of mines, i. e. mineral-bearing strata, is not an incorporeal but a corporeal hereditament, and cannot be claimed by prescription (*Wilkinson v. Proud* (1843) 11 M. & W. 33). Neither could it pass by grant before 1845 (*D. of Sutherland v. Heathcote, ubi sup.*, at p. 483). It is the right to search for and take away minerals in and from the soil of another, which is incorporeal.]

1260. Rights to fish (other than franchise or own- *Fishing*
ership rights) are (i) several fishery in non-tidal waters,
and (ii) common of piscary.

[The inconsistency in the use of words to describe fishing rights has been mentioned previously, and the practice adopted in this work explained (see *ante*, § 1229, n.).]

1261. A several fishery is the exclusive right of *Several*
fishing in non-tidal water covering the soil of the ser- *fishery*
vient tenement, and taking away the fish caught.^(a)
Such a right is presumed to include the ownership
of the soil of the servient tenement; but this pre-
sumption may be rebutted.^(b)

(a) Co. Litt. 122 a.

(b) *Smith v. Kemp* (1692) 2 Salk. 637, *per* Lord Holt, C. J.

Scratton v. Brown (1825) 4 B. & C. 485.

Holford v. Bailey (1846) 8 Q. B. 1000.

Marshall v. Ulleswater Steam Navigation Co. (1863) 3 B. & S. 732.

Fitzgerald v. Firbank [1897] 2 Ch., at p. 101, *per* Lindley, L. J.

Hanbury v. Jenkins [1901] 2 Ch., at p. 411, *per* Buckley, L. J.

[This point has been the subject of acute controversy; and the rule in the text is alleged (e. g. by Cockburn, C. J., in *Marshall v.*

Ulleswater, &c. Co., *ubi sup.*, at p. 747) to be inconsistent with a well-known passage in Coke (Co. Litt. 4 b), where Coke says that on a grant of *separalis piscaria* "the soile doth not passe." But there appears to be no inconsistency. If an actual grant is produced, and a grant of a "fishery" (without more) is shown, Coke's rule applies (see *Hindson v. Ashby* [1896] 2 Ch., at p. 10, *per* Lindley, L. J., and *Ecroyd v. Coulthard* [1897] 2 Ch. 554). But if the claimant relies on a presumed conveyance, it will be presumed that this conveyance contained words apt to pass the soil. (*D. of Somerset v. Fogwell* (1826) 5 B. & C., at p. 886, *per Curiam*.) In such cases, of course, the owner of the right can bring Trespass against an intruder (*Holford v. Bailey, ubi sup.*); and, probably, the same rule applies where the soil is not included (*Hindson v. Ashby, ubi sup.*). He can also, as we have seen, seize the boats, gear, and tackle of the intruders, as damage feasants (*Reynell v. Champenoon* (1631) Cro. Car. 228). It is difficult, however, to understand how a man could prescribe for such rights; for they really amount to a corporeal hereditament.]

*Change of
river-bed*

1262. The owner of a several fishery in a non-tidal river which gradually changes its course, is not by such change deprived of his exclusive right of fishing in the river; even though the ancient boundaries of the river can be traced.

Foster v. Wright (1878) 4 C. P. D. 438.

[*Semle*, the same rule applies to common of piscary. In this case, the Court distinguished the *Mayor of Carlisle v. Graham*, (1869) L. R. 4 Ex. 361 (*ante*, § 1231).]

*Common
of piscary*

1263. Common of piscary is the right of fishing, in common with the owner or occupier of the servient tenement, and with or without other

persons, in water covering the soil of the servient tenement.

Co. Litt. 122 a.

Smith v. Kemp (1692) 2 Salk., at p. 638.

[The cases in which common of piscary has been actually recognized seem to be singularly few; except in the case of copyholders, whose rights can hardly be treated as exactly equivalent to incorporeal hereditaments, though on enfranchisement such rights might become true incorporeal hereditaments (*Tilbury v. Silva* (1890) 45 Ch. D. 98). Was the right established in *Fitz-gerald v. Firbank* (1897) 2 Ch. 96 ("exclusive right of fishing" with rod and line) common of piscary or several fishery?]

1264. Common of turbary is the right of taking, *Turbary* in common with other persons, sufficient quantity of turves or peat for the purposes of a messuage to which the right is appendant or appurtenant.^(a) *Semble*, there cannot be common of turbary in gross.^(b)

(a) *D. & C. of Ely v. Warren* (1741) 2 Atk. 189, per Lord Hardwicke, C.

Peardon v. Underbill (1850) 16 Q. B. 120.

Lascelles v. Onslow (1877) 2 Q. B. D. 433.

(b) *Tyrringham's Case* (1584) 4 Rep., at 37 a.

[The destruction of an ancient messuage, to which rights of turbary and estovers were appurtenant, does not, necessarily, extinguish such rights, which may attach to a new messuage built to replace the old; provided that the change does not impose an additional burden on the servient tenement (*A. G. v. Reynolds* [1911] 2 K. B. 888).]

1265. Common of estovers is the right of taking *Estovers* sufficient wood from the trees growing on the servient tenement for the repair and fuel of the messuage

to which the right is appurtenant. Such a right does not prevent the owner of the servient tenement making his profit of the wood; but if he does not leave sufficient to satisfy the right of estovers, an action for damages will lie against him.

Sir Henry Nevil's Case (1570) Plowd., at p. 381.

Luttrell's Case (1601) 4 Rep., at 87 a.

Basset v. Maynard (1601) Cro. Eliz. at 820.

Countess of Arundel v. Steere (1605) Cro. Jac. 25.

[The last case shows that a claim of estovers for building new houses on the same tenement may be supported by prescription.]

Game

1266. Rights to game (other than fish) are rights, exclusive or non-exclusive, of hunting, hawking, coursing, fowling, shooting, and taking away, beasts and birds upon land in the occupation of another person.^(a) Any such right is now subject to the co-existing right of the occupier of the servient tenement (including the owner if he is also occupier) to kill ground game under the Ground Game Act, 1880, and the Ground Game (Amendment) Act, 1906.^(b)

(a) *Wickham v. Hawker* (1840) 7 M. & W. 63.

Graham v. Ewart (1855) 11 Exch., at p. 346, *per Curiam*.

Jeffryes v. Evans (1865) 19 C. B. N. S. 246 (explaining *Graham v. Ewart*, *ubi sup.*, *ad fin.*).

Gearns v. Baker (1875) L. R. 10 Ch. App. 355.

Morgan v. Jackson [1895] 1 Q. B. 885.

Lowe v. Adams [1901] 2 Ch. 598.

[The extent of the right is a question of construction in each case (*Moore v. Lord Plymouth* (1817) 7 Taunt. 614); or, *semble*, if the claim is by prescription, a question of fact for the jury.]

- (b) 43 & 44 Vict. (1880) c. 47.
 6 Edw. VII (1906) c. 21.
Stanton v. Brown [1900] 1 Q. B. 671.
Anderson v. Vicary [1900] 2 Q. B. 287.

[As to the compensation for damage claimable by a tenant for damage to his crops by game, the right to take and kill which is not vested in him, see *ante*, § 783. A grant of a true profit *à prendre* must be carefully distinguished from a mere license to shoot.]

1267. An occupier over whose land a right of sporting exists may, in the absence of express agreement to the contrary, do any act in the *bonâ fide* management of his land; notwithstanding that such act may incidentally prejudice the sporting right. This rule does not extend to acts done with the express intention of causing such prejudice.

*Rights of
servient
owner*

- Jeffries v. Evans* (1865) 19 C. B. N. S.
Gearns v. Baker (1875) L. R. 10 Ch. App. 355.

1268. The person in whom a right of sporting is vested may do any acts upon the land which are reasonably necessary for preserving the enjoyment of such right; even though such acts are *primâ facie* unlawful.

*Rights of
sportsmen*

- (No. 2) *Cope v. Sharpe* [1912] 1 K. B. 497. ('Reasonably necessary' mean, such a state of facts that a reasonable man would have done what the defendant did.)

1269. The person in whom a right of sporting is vested is liable to an action for damages and, if nec-

*Overload-
ing with
game*

essary, an injunction; by the occupier of the servient tenement; if the owner of the right of sporting, by artificial means, so increases the game on the servient tenement as to cause damage to the crops grown thereon. *Semble*, if he does, the occupier may also destroy the excess of game.

Birkbeck v. Paget (1862) 31 Beav. 403.

Farrer v. Nelson (1885) 15 Q. B. D. 258.

[For the difficult question whether such a person is liable (apart from statute) to his neighbours, see *ante*, Bk. II, Pt. III, § 783.]

ADVOWSONS

Advowson

1270. An advowson is the perpetual right of patronage of an ecclesiastical benefice.^(a) Advowsons may be either presentative (where the right is only to present a fit clerk to the bishop of diocese),^(b) or collative (where the bishop has the right both to nominate and to institute).^(c)

(a) Co. Litt. 17 b.

A. G. v. Ewelme Hospital (1853) 17 Beav., at p. 383, *per* Romilly, M. R.

[In the last case, it was suggested by the Court that the term would, at one time, also have included the right of nomination to a benefice not strictly ecclesiastical, e. g. eleemosynary or academic.]

(b) But where a fit clerk is presented, the right is legal and absolute (*Bishop of Exeter v. Marshall* (1867) L. R. 3 H. L. 17). It is even said that it may be exercised by word of mouth (*A. G. v. Brereton* (1751) 2 Ves. Sr., at p. 429, *per* Lord Hardwicke, C.).

(c) There was formerly a third kind of advowson, called "donative," by virtue of which the patron nominated, instituted, and inducted. But these are now, if accompanied by cure of souls, converted into advowsons presentative by the Benefices Act, 1898, s. 12.

[An advowson, though a "hereditament," and even a "tenement," is not properly described as being "situate at" any particular place; though it may pass under such a description, if the whole of the circumstances and expressions of the conveyance point to that conclusion (*Crompton v. Farratt* (1885) 30 Ch. D. 298). An advowson is available to satisfy the debts of its owner, both during his lifetime (Judgments Act 1838, s. 11) and after his death (*Tong v. Robinson* (1730) 1 Bro. P. C. 114. But the creditors' rights are now, presumably, subject to the restrictions on the sale of advowsons imposed by the Benefices Act, 1898 (*post*, § 1271).]

1271. No transfer of an advowson is valid unless: — *Restraints on transfer*

- (i) it is registered in the prescribed manner in the registry of the diocese (? in which the church is situated) within one month from the transfer, or such other time as the bishop may think fit to allow;
- (ii) it transfers the whole interest of the transferor (except that a life interest may be reserved to the settlor in a family settlement, and a right of redemption may be reserved in a mortgage);
- (iii) more than twelve months have elapsed since the last institution or admission to the benefice.

Benefices Act, 1898, s. 1 (1).

[This enactment put an end to the practice of alienating "next presentations"; at one time very common. *Seemle*, such rights of next presentation as still exist may be exercised, subject to the provisions of the Act. A 'transfer' does not include any transmission by operation of law, nor a transfer on the appointment of new trustees, where no beneficial interest passes (*ibid.* (6)).]

*No separate sale
by auction*

1272. No advowson may be offered for sale by public auction, except in conjunction with a manor,^(a) or with an estate in land of not less than one hundred acres situate in the same parish as the benefice, or an adjoining parish, and belonging to the owner of the advowson.^(b)

(a) Does this mean strictly appendant or appurtenant to the manor ; or merely in the same ownership ?

(b) Benefices Act, 1898, s. 1 (2).

[Breach of this rule renders the breaker liable to a penalty of £100, recoverable on summary conviction (*ibid.*).]

*Next presentations and
resignations*

1273. No agreement for the exercise of a right of ecclesiastical patronage in favour or on the nomination of any particular person, is valid ; nor is any agreement on the transfer of an advowson valid which contemplates : —

- (i) the re-transfer of the advowson ;
- (ii) the postponement of the payment of the consideration for such transfer, or the payment of interest, until a vacancy, or for more than three months ;
- (iii) any payment in respect of the date at which a vacancy occurs ;
- (iv) the resignation of a benefice in favour of any person.

Ibid. s. 1 (3).

[This clause aims at putting an end to both the purchase of “turns” with a view of presenting the purchaser, and the gift of

a living to be held until another candidate is ready. *Semble*, the Benefices Act, 1898, does not, except as above stated, affect the validity of a resignation bond given by a clergyman on his presentation under the Clergy Resignation Bonds Act, 1824.]

1274. A transfer by act of a private person of a *Void benefice* vacant benefice cannot pass the right to present to the existing vacancy.

Stephens v. Wall (1569) 3 Dyer, 282 b.

Brooksby's Case (1590) Cro. Eliz. 173.

Fox v. B. of Chester (1829) 6 Bing., at p. 17, *per Best*, C. J.

[The rule has no application to the Crown (*Stephens v. Wall, ubi sup.*); but, even on a grant by the Crown, the next presentation to the existing vacancy will not pass unless expressly named (*Case of Bedminster Manor* (1571) 3 Dyer, 300 a; *Weston's Case* (1576) *ibid.* 347 a). The vacant turn remains with the grantor or his personal representatives (*Stephens v. Wall, ubi sup.*).]

1275. By the grant of a manor with its appurtenances by the Crown, an advowson which is appendant to the manor does not pass; unless it is expressly included in the grant.^(a) A similar rule holds in the case of a demise for years of a manor by a private person, without mention of "appurtenances."^(b)

(a) *De Prærogativâ Regis* (17 Edw. II (n. d.)), c. 17.

Gorge's and Dalton's Case (1587) 3 Leon. 196.

Whistler's Case (1613) 10 Rep. 63 a.

(b) *Higgins v. Grant* (1583) Cro. Eliz. 18.

[Presumably, in spite of the words of the so-called statute, the doctrine applies to advowsons appendant. *Quære*: can there be an advowson appurtenant? By a temporary severance of an ad-

vowson from a manor, the advowson becomes a gross; but on re-union with the manor, it becomes once more appendant (*Ive's Case* (1597) 5 Rep., at 11 b; *Hartopp's and Cock's Case* (1627) Hutt. 88; *Rooper v. Harrison* (1855) 2 Kay & J., at p. 109, *per* Wood, V. C.). For the general rule about the passing of rights appendant or appurtenant on a conveyance of the dominant tenement, see *ante*, § 1195.]

Simony

1276. Any purchase of a next presentation by a clerk with a view to his own presentation, renders such presentation void, and is a cause of forfeiture of the turn to the Crown.^(a) But the owner of an advowson, however small his interest,^(b) or of the next presentation,^(c) may offer himself or other fit clerk to the bishop for institution.

- (a) Simony Act, 1713, s. 2. (Of course this provision is, so far as future transactions are concerned, rendered practically unnecessary by s. 1 (1) of the Benefices Act, 1898 (*ante*, § 1271), which makes the sale of next presentation void in any circumstances.)

Lee v. Merest (1870) 39 L. J. Ecc. 53.

- (b) *Sherrard v. Lord Harborough* (1753) Ambl., at p. 166, *per* Lord Hardwicke, C.

E. of Albemarle v. Rogers (1796) 7 Bro. P. C. 522 (estate for years).

Walsh v. B. of Lincoln (1875) L. R. 10 C. P. 518 (estate *pur autre vie*).

Lowe v. B. of Chester (1883) 10 Q. B. D. 407.

- (c) *Harris v. Austin* (1613) 3 Bulstr. 36.

*Lapse to
Crown by
promotion*

1277. Where a beneficed clerk is promoted by the Crown, the right to present to the vacancy caused by his promotion passes to the Crown. But the owner of the next presentation, who has thus been deprived of his turn, may present to the next vacancy

of the benefice.^(a) The fact that the Crown has itself previously sold the advowson to a private person, does not deprive the Crown of the right to present on a vacancy caused by promotion.^(b)

(a) *Troward v. Calland* (1796) 8 Bro. P. C. 71.

(b) *The Queen v. Eton College* (1857) 8 E. & B. 610 (*dictum*).

[The prerogative of the Crown does not extend to a vacancy caused by the promotion of an incumbent to a colonial bishopric erected and constituted solely by the exercise of the prerogative. *Quære*: as to a bishopric in Ireland or constituted under Act of Parliament (*The Queen v. Eton College, ubi sup.*).]

1278. No Roman Catholic may present to any ecclesiastical benefice (of the Church of England); and no person holding an advowson or right of presentation in trust for a Roman Catholic, may present any clerk to such benefice;^(a) and no Jew may exercise official ecclesiastical patronage, or advise the Crown with regard to the exercise of such patronage.^(b) The right to exercise Anglican ecclesiastical patronage vested in or held in trust for Roman Catholics, belongs to the Universities of Oxford and Cambridge;^(c) the right to exercise the ecclesiastical patronage of an office under the Crown held by a Jew, belongs to the Archbishop of Canterbury for the time being.^(d)

*Patronage
of Catholics
and Jews*

(a) 1 & 2 W. & M. (1688) c. 26, ss. 1 & 2' (affirming 3 Jac. I (1605) c. 5), which gives the division between the universities.

Presentation of Benefices Act, 1713, s. 1.

Church Patronage Act, 1737, s. 5. (This Act avoids all transfers of advowsons by Catholics, other than *bonâ fide* sales to Protestant purchasers.)

Roman Catholic Relief Act, 1829, s. 16.

- (b) Jews Relief Act, 1858, s. 4.
- (c) 3 Jac. I (1605) c. 5.
Benefices Act, 1898, s. 7.
- (d) Jews Relief Act, 1858, s. 4.

*Lapse on
vacancy.*

1279. If the patron of an ecclesiastical benefice allows it to remain vacant for six calendar months, the ordinary of the diocese (not being himself the patron) may present and institute at any time within the next six months.^(a) If such ordinary does not present within such period, or is not entitled to present, the archbishop of the province (not being patron or ordinary) may present at any time within a further period of six months.^(b) If such archbishop is not entitled to present, or does not present, within such further period, the right of presentation for that turn lapses to the Crown.^(c) But the patron may present at any time before the benefice has been filled.^(d)

- (a) Statute of Provisors (25 Edw. III (1351) st. 4).
Ordinance for the Clergy (25 Edw. III (1351) st. 6) c. 7.
Archbishop of York's and Willock's Case (1573) 3 Dyer, 327 b.
Catesby's Case (1606) 6 Rep. 61 b.

[If the vacancy is caused by resignation or deprivation, the patron's period only begins to run from receipt by him of notice of the vacancy (13 Eliz. (1571) c. 12, s. 7; Clergy Discipline Act, 1892, s. 6 (3)). So also, if the bishop refuses the patron's presentee for illiteracy, (but not for crime), the period of lapse will be suspended until notice of such refusal is given to the patron (*Hale v. B. of Exeter* (1691) 2 Salk. 539).]

- (b) *Bedinfield v. Abp. of Canterbury* (1570) 3 Dyer, 292 b.
Grendon v. B. of Lincoln (1575) Plowd., at p. 498.
Lancaster v. Lowe (1615) Cro. Jac., at p. 93.

- (c) Statute of Provisors, *ubi sup.*
 (d) *The King v. B. of Winton* (1604) Cro. Jac. 53.
Booton v. B. of Rochester (1618) Hutt. 24.

[There appears to be some doubt whether a presentation by the patron is good if the turn has lapsed to the Crown (*Cumber v. Ep. Chichester* (1608) Cro. Jac. 216). Where there has been a refusal of the bishop to institute or admit, the period which has elapsed between the presentation and the refusal is not counted for purposes of lapse; nor, if there is an appeal against the refusal, is the time between refusal and the decision of the appeal counted (Benefices Act, 1898, s. 5). The question of vacancy or plenarity of the benefice is for the ecclesiastical court (25 Edw. III (1351) st. VI, c. 8).]

TITHE RENT CHARGE

1280. Tithe rent charge is an annual sum of money charged upon and issuing out of land formerly subject to a claim of tithes, in lieu of such tithes. *Tithe rent charge*

Walsh v. Trimmer (1867) L. R. 2 H. L. 208.

[Tithes, or the tenth part of the produce of land, were claimable as of common right by the ordinary of the parish from all land therein, i. e. it was presumed that all land was subject to the claim. Many exemptions were, however, recognized, e. g. certain lands formerly held by ecclesiastical corporations were exempt, a *modus* or composition in lieu of tithe might be validly agreed on, or, simply as the result of long *de facto* exemption, a legal release might be presumed (fixed by the Tithe Act, 1832, s. 1, at sixty years, or two occupations of the claimant's benefice and three years more, whichever is the longer period). Tithes were described as "great," i. e. those of hay, corn, and wood, or "small" (or "privy"), i. e. those of other produce. The former, or the equivalent for them, may be in lay hands, which fact makes them properly the subject of this work. The inconveniences attendant upon the taking of tithes in kind led to the passing of a series of statutes (known as the Tithe Acts, 1836 to 1891) having for their object the commutation of tithes in kind into an annual rent charge, varying with the

price of corn, formerly the chief subject of tithe. It will be noted, however, that the commutation is of the liability to tithes, not of the tithe actually taken; and, consequently, as new land is brought into cultivation, it becomes (subject to §§ 1283, 1284) liable to tithe rent charge (*Walsh v. Trimmer, ubi sup.*). It should be noted also, that the Commutation Acts do not apply to tithes of fish or fishing, personal tithes, or mineral tithes; except where there is a parochial agreement approved by the Board of Agriculture and Fisheries (Tithe Act, 1836, s. 90), by which the commutation of tithes is now effected (Board of Agriculture Act, 1889, s. 2, and Sched. I, Pt. II).]

Liability for **1281.** Tithe rent charge is payable by the owner of the land subject to the charge; and any contract made since 26th March, 1891, between the owner and the occupier of such land, for the payment of the charge by the occupier, is void. If a contract to that effect was entered into before that date, the occupier is not bound by it; but he is liable to pay to the owner of the land such sum as such owner shall have properly paid on account of the charge agreed to be paid by the occupier.

Tithe Act, 1891, ss. 1, 9 (i).

[For the definition of "owner" see Tithe Act, 1836, s. 12.]

Recovery of **1282.** The owner of tithe rent charge (other than a charge payable under the Extraordinary Tithe Redemption Act, 1886, or a charge representing tithes on gated or stinted pasture, or a sum or rate assessed as tithe on common rights of pasture) may recover

the charge, either by distress (where the land subject to the charge is occupied by the owner of such land) or by the appointment of a receiver of the rents and profits of the land (where the owner of the land is not in occupation).^(a) There is no personal liability (apart from express contract) for the payment of ordinary tithe rent charge.^(b)

(a) Tithe Act, 1891, s. 2.

[The distress is effected through the officer of the County Court, who exercises the powers conferred on the owners of tithe rent charge by ss. 81-85 of the Tithe Act, 1836, which include the power to obtain possession of the land if there is no sufficient distress. Not more than two years' arrears may be recovered (Tithe Act, 1891, s. 10 (1)).]

(b) Tithe Act, 1836, s. 81.
Tithe Act, 1891, s. 2 (9).

1283. Where the County Court is satisfied that the sum claimed as tithe rent charge in proceedings under § 1282 exceeds two-thirds of the value of the lands on which it is charged, being lands used solely for agricultural or pastoral purposes, or for the growth of timber or underwood, for the twelve months preceding the date on which it fell due, the Court must remit such excess. *Remission of excess*

Tithe Act, 1891, s. 8.

[The section contains various provisions for relieving the owner of the tithe rent charge of a corresponding proportion of rates, for apportioning the remission between the owners of various charges

on the same land, and for the case of special apportionment of the charge on different parts of land out of the whole of which the tithes which it represents were formerly payable.]

*Extraordi-
nary tithe
rent charge*

1284. An “extraordinary tithe rent charge” is an annual sum charged on and issuing out of land formerly subject to an extraordinary charge under the Tithe Act, 1836, in lieu of liability to such charge.^(a) Subject to any agreement made before the 25th June, 1886, such charge is payable by the landlord^(b) of the land subject thereto. Such extraordinary tithe rent charge is a first charge on the land subject to it; it is recoverable by action as well as in the manner applicable to ordinary tithe rent charge (§ 1282, *ante*); and it is not subject to any parochial, county, or other rate, charge, or assessment.^(c)

(a) Extraordinary Tithe Redemption Act, 1886, s. 3.

(b) *Ibid.*, s. 7. (There is no definition of the term “landlord” in the Act; but the definition given of “landowner” seems to agree with that referred to above in § 1281, n.)

(c) *Ibid.*, s. 4.

[Extraordinary tithe rent charge represents a charge reserved by the Tithe Act, 1836, s. 42, to be claimed by the tithe-owner in respect of land newly cultivated in a specially profitable way, e. g. as hop grounds, orchards, fruit plantations, and market gardens. This charge was abolished in 1886, as regards land newly cultivated after the passing of that Act; but it was provided by the Act that the Land Commissioners (now the Board of Agriculture) should value the capital liability then existing in respect of it throughout the country, and assess on the land liable a perpetual rent charge equivalent to 4 *per cent. per annum* on such capital value. Thus the charge under the Act only applies to land cultivated before the passing of the Act in the manner specified.]

1285. No ordinary tithe rent charge is merged or Merger
 extinguished by implication of law in any estate of
 which the person for the time being entitled to such
 rent charge may be seised or possessed in the land
 subject to the charge.^(a) But the owner in possession
 in fee simple or fee tail, or the person having the
 power of acquiring or disposing of the fee simple,
 whether legal or equitable, of such rent charge, may,
 by signed and sealed declaration, approved by the
 Board of Agriculture, release, assign, or otherwise
 dispose of the same, so as to cause a merger thereof
 in the freehold and inheritance of the land subject
 to the charge.^(b) And where such tithe rent charge
 and the land subject thereto are settled to the same
 uses, the owner of an estate for life, legal or equi-
 table, in both the land and the charge, has similar
 powers.^(c) Where tithe rent charge is merged under
 these provisions, all existing incumbrances on the
 charge become incumbrances on the inheritance of
 the land.^(d)

(a) Tithe Act, 1836, s. 71.

(b) *Ibid.*

Tithe Act, 1838, s. 1.

Tithe Act, 1846, s. 19.

[The approval of the Board of Agriculture is conclusive of the
 title to make the merger (*Walker v. Bentley* (1852) 9 Ha. 629).]

(c) Tithe Act, 1838, s. 3.

(d) Tithe Act, 1839, s. 1.

[These provisions apply equally to copyholds of inheritance or
 for life (Tithe Act, 1838, s. 4; 1839, s. 7). There appears to be
 no provision as to the merger of extraordinary tithe rent charge.]

B B

*Redemption
of tithe rent
charge*

1286. The owner of, or any person interested in, land subject to extraordinary tithe rent charge, at his own option,^(a) the owner of the land subject to an ordinary tithe rent charge not exceeding twenty shillings, or the owner of such charge, at his own option,^(b) and the owner of land subject to an ordinary tithe rent charge exceeding twenty shillings, with the concurrence of the owner of the rent charge,^(c) may redeem or cause to be redeemed such rent charge with the approval of the Board of Agriculture, in manner provided by the Tithe Acts, 1836 to 1891.

(a) Extraordinary Tithe Redemption Act, 1886, s. 5.

[In this case, the redemption money is simply the capital value of the liability as estimated by the Board under § 1284, n. In the case of charge payable to an incumbent of a benefice, the redemption money is paid to the Commissioners of Queen Anne's Bounty. In other cases it is paid to an absolute owner, or into the Bank of England (*ibid.*).]

(b) Tithe Act, 1878, s. 3.

[The redemption money is here twenty-five times the amount of the charge (*ibid.*).]

(c) *Ibid.* s. 4.

[The consents of the bishop and patron are required when the charge exceeds twenty shillings, and is received by the incumbent of a benefice as such (Tithe Act, 1878, s. 4). Where the land is so sub-divided for building or other purposes that the charge cannot conveniently be apportioned, the Board may, on application of the owner of the charge, direct redemption on payment of a sum not exceeding twenty-five times the amount of the charge (*ibid.* s. 5). Where land is acquired for certain public purposes (e.g. church, cemetery, public elementary school, municipal building, artisans' dwellings, sewage farm, water works), the promoters of the scheme *must* redeem the charge on payment of twenty-five times its amount (Tithe Act, 1878, s. 1).]

RENT CHARGE (OTHER THAN TITHE RENT CHARGE)

1287. A rent charge (not being a tithe rent *Rent charge* charge) is an annual sum of money or other render charged on and issuing out of land, or an estate in land, and payable by the terre-tenant of the land, but not by way of service to a reversioner.

Litt. s. 218.
Co. Litt. 143 b-147 b.

[Rents charge played a much more important part in former times than now, when the repeal of the Usury Acts and the appearance of many other forms of investment have rendered them of less importance. They were contrasted from early times with rents service, i. e. rents reserved on the creation of tenure. Rents not incident to tenure could not be recovered by distress; unless they were granted with a clause giving a right of distress, in which latter case the rent was known as a "rent charge," while a rent not recoverable by distress was known as a "rent seck." The passages above referred to, however, show that the grant of an express power of distress to recover a non-tenurial rent was well known in the fifteenth century; but it is only comparatively recently that such power has been made independent of express grant. The distinction between rents charge (in the older sense) and rents seck is now obsolete (Landlord and Tenant Act, 1730, s. 5).]

1288. In addition to the statutory remedies of distress and eviction (§ 1289), and any equitable remedy in respect of the land (§ 1290), the person entitled to a rent charge may, in the absence of express provision to the contrary, recover the amount *Personal liability of terre-tenant*

B B 2

thereof from the terre-tenant of the land (including a mortgagee) by action of debt.

Litt. ss. 219, 220, 233, 238.

Co. Litt. 144 b-147 b.

Thomas v. Sylvester (1873) L. R. 8 Q. B. 368.

Christie v. Barker (1884) 53 L. J. Q. B. 537.

Pertwee v. Townsend [1896] 2 Q. B. 129.

Re Herbage Rents [1896] 2 Ch. 811.

Foley's Charity v. Corporation of Dudley [1910] 1 K. B. 317.

Cundiff v. Fitz-simmons [1911] 1 K. B. 513.

Presumably the terre-tenant is only liable for rent which accrues due during his tenancy (*Fairfax v. Derby* (1708) 2 Vern. 612). But, subject to that restriction, his liability is not limited by the value of the profits which he has actually received (*Re Herbage Rents, ubi sup.*; *Foley's Charity v. Dudley, ubi sup.*). And an owner of part of the land subject to the charge can be sued in respect of the whole arrears (*Baith v. Smith* (1884) 51 L. T. 395); being left to his action to recover a proportion from the owners of the rest (*Christie v. Barker, ubi sup.*). But a tenant for years at a rack rent is not a "terre-tenant" for purposes of this § (*Re Herbage Rents, ubi sup.*); though a mortgagee in fee is, even though he has never entered (*Cundiff v. Fitz-simmons* [1911] 1 K. B. 513). It is said by Coke (Co. Litt. 144 b) that no personal remedy lies for the recovery of a rent granted for "owelty" (equality) of partition, or of such a rent as can be created without deed.]

*Recovery by
distress*

1289. The person entitled to a rent charge created since 1881 may, subject to all interests having priority to the charge, if payment is in arrear for twenty-one days, enter upon the land subject to the charge, and distrain thereon for such arrears and costs, and, if payment is in arrear for forty days, enter into possession and hold such land, or any part thereof, and take the income thereof, without im-

peachment of waste, until all arrears are fully paid, and, whether taking possession or not, may demise the land, or any part thereof, to a trustee for a term of years upon trust to raise such arrears.^(a) The person entitled to a rent charge created before 1881, may distrain for arrears; but has not the other remedies above specified in this §.^(b)

(a) Conveyancing Act, 1881, s. 44.

(b) Landlord and Tenant Act, 1730, s. 5.

[The remedies given by the Conveyancing Act, 1881, s. 44, are strictly confined to the extent to which these remedies "might have been conferred by the instrument under which the (rent) arises." *Quære*: Can the owner of a rent charge distrain on the goods of strangers? For an anticipation by the Court of Chancery of part of these statutory remedies, see *Foster v. Foster* (1700) 2 Vern. 386.]

1290. In addition to the remedies described in *Equitable remedies* §§ 1288, 1289, the Court, in the exercise of its equitable jurisdiction, may, on the application of the owner of the rent charge, order a sale or mortgage of the estate out of which the rent charge issues, in order to raise arrears thereof.

Cupit v. Jackson (1824) 13 Price, 721.

Hambro v. Hambro [1894] 2 Ch. 564.

[In both these cases the settlements were made before 1882; but, though the decision in the latter was given many years after the passing of the Conveyancing Act, 1881, the Court made no exception in respect of rents charge coming within s. 44 of that Act.]

No action
of waste by
rent-charger

1291. (*Semble*) the owner of a rent charge cannot bring an action to restrain waste by the tenant.

Sandeman v. Rushton (1891) 61 L. J. Ch. 136.

Release of
part of land

1292. Notwithstanding the release by the owner of the rent charge of a portion of the land on which it is chargeable, the owner of the residue of the land will be liable to pay such part of the charge as is proportionate to such residue.

Co. Litt. 148 a.

Law of Property and Amendment Act, 1859, s. 10.

Booth v. Smith (1884) 14 Q. B. D. 318.

[If the owner of the unreleased part of the land joins in the release, his part remains liable for the whole charge (*Price v. John* [1905] 1 Ch. 744).]

Division and
extinction of
charge

1293. A rent charge is divisible;^(a) but the purchase by the owner of the rent charge of part of the land subject to the charge will extinguish the charge entirely.^(b)

(a) Co. Litt. 148 a.

Ards v. Watkins (1597) Cro. Eliz. 637, 651.

(b) Litt. s. 222.

Dennett v. Pass (1834) 1 Bing. N. C. 388. (But see *Knight v. Calthorpe* (1685) 1 Vern. 347.)

[The rule is otherwise when the part of the land comes to the owner of the rent charge by operation of law (Litt. s. 224). *Quære*: whether the personal remedy is gone (Co. Litt. 150 a). A rent charge (including a tithe rent charge) is apportionable day by day in respect of time; but the person liable to pay it is not bound to pay any apportioned part until the ordinary day for payment arrives (Apportionment Act, 1870, ss. 2, 3).]

1294. Any perpetual rent charge (not being a *Redemption of charge* tithe rent charge or a rent reserved on a sale or lease or made payable under a grant or license for building purposes) may be redeemed by the owner of the land subject thereto, on payment or tender to the person absolutely entitled thereto, or entitled to dispose thereof absolutely or to give an absolute discharge for the capital value thereof, of the amount of money certified by the Board of Agriculture as the redemption value thereof.

Conveyancing Act, 1881, s. 45.

OFFICES

1295. An office, for the purposes of this Title, *Office* consists of the right to perform certain duties in connection with land, and to take such salary, fees, and perquisites therefor or in connection therewith, during such period, as may be prescribed by the grant creating the office or sanctioned by custom.

Litt. s. 378.

Co. Litt. 233.

[It was of the essence of feudalism, that functions, which we should now consider to be properly functions of the State, should be performed by subjects in connection with the tenure of land, and be remunerated either out of the profits of the land or the fees paid by persons resorting to the offices. Thus these offices came to be regarded as private property, and were freely bought and sold. At the close of the Middle Ages, a strong effort was made to put an end to this practice, by the Sale of Offices Act, 1551, which prohibited the traffic in offices concerned with the administration of justice, the receipt or disbursement of the royal revenue, and the management or custody of the royal domains or places of national

defence. But offices of inheritance then actually in the hands of subjects, and forest and manorial offices, were expressly excepted (s. 3); and an exception was also made (s. 7) of judicial patronage. As the result of a long course of political and economic reform, most of the excepted offices, other than those of a purely ceremonial character, have been converted into offices held at pleasure or during good behaviour; but the offices of various franchises which still survive (§§ 1205, 1208, 1209, 1215, and see *Godbolt's Case* (1577) 4 Leon. 33), of which the most conspicuous is the stewardship of a manor, render it necessary to deal briefly with the topic. Whether an owner of land can attach to it a new proprietary office of a purely private character, is a question on which there does not appear to have been any decision; but, on general principles (*ante*, §§ 1188, 1201), the answer would seem to be in the negative. Strictly, an office can only be created or transferred by deed. But an appointment by deed may be presumed on evidence of holding (*McMahon v. Leonard* (1858) 6 H. L. C. 970.)]

*Reversion-
ary office.*

1297. Subject to any express or implied statutory prohibition, a grant of an office in reversion by a private person is good.

Young v. Stowell (1632) Cro. Car. 279.

[It was held in *Reynel's Case* (1612) 9 Rep. 94 b, that a grant for years of an office requiring the exercise of trust or discretion was void. But that was a Crown office. *Quære*: as to a private office.]

*Discharge of
incumbent*

1298. Where there is no fee or profit attached to the holding of an office, the holder thereof may be discharged by the grantor before his (the holder's) interest has expired. Where a fee or profit is attached, the rule is the other way.

Co. Litt. 233.

Harvy v. Newlyn (1601) Cro. Eliz. 859.

Bartlett v. Downes (1825) 3 B. & C. 616.

1299. To every grant of an office an implied condition is annexed for the due performance by the grantee of the duties of the office; and breach of such a condition upon request of performance is a cause of forfeiture.^(a) Acceptance of an incompatible office is also a cause of forfeiture.^(b) *Implied condition of good behaviour*

- (a) Litt. s. 378.
Co. Litt. 233 b.
Earl of Shrewsbury's Case (1610) 9 Rep. 50.
Bennet v. Easedale (1626) Cro. Car. 55.
- (b) *R. v. Patteson* (1832) 4 B. & Ad. 9.

[Forfeiture by a tenant in tail is a forfeiture of the entire office; but forfeiture by a holder for life of an inheritable office is only forfeiture of the life interest (*Nevil's Case* (1604) 7 Rep. 33 a). If the office is one which could be surrendered by the holder at pleasure, the forfeiture takes place at once on the acceptance of an incompatible office; if not, the office is not actually vacated till amotion (*R. v. Patteson, ubi sup.*).]

1300. Whether the grantee of an office has power to alienate it, is a question of construction of the terms of the grant. If the grantee has power to alienate, he has power to appoint deputies. *Alienation of office*

Earl of Shrewsbury's Case, ubi sup., at 48 b.

[Where the office involves the exercise of special skill, there is a presumption against its alienability (*Sir Henry Nevil's Case* (1570) Plowd. 379).]

TITLE X — CUSTOMARY RIGHTS OVER LAND

*Customary
right*

1301. A right in the nature of an easement over land may be claimed on the ground of immemorial custom by a person on behalf of himself and other members of a limited but indeterminate class, defined by reference to locality, independently of the occupation or ownership of any dominant tenement.^(a) A right in the nature of a profit à prendre (other than a mining right^(b) or a right under a manorial custom)^(c) cannot be so claimed;^(d) at any rate except upon payment of a reasonable fee.^(e) A customary right over land will be construed strictly.^(f)

- (a) *Abbot v. Weekly* (1665) 1 Lev. 176.
- Fitch v. Rawling* (1795) 2 H. Bl. 393.
- Tyson v. Smith* (1838) 9 A. & E. 406 (Here the restriction of locality was very vague).
- Mounsey v. Ismay* (1863) 1 H. & C. 729.
- Bourke v. Davis* (1889) 44 Ch. D., at p. 120, *per* Kay, J.
- Mercer v. Denne* [1905] 2 Ch. 538.

[*Edwards v. Jenkins* [1896] 1 Ch. 308, in which Kekewich, J., decided that a customary right of user of land could not be claimed on behalf of the inhabitants of three adjacent parishes, is probably wrong.]

- (b) *Rogers v. Brenton* (1847) 10 Q. B. 26.
- Ivimey v. Stocker* (1866) L. R. 1 Ch. App., at p. 403, *per* Lord Cranworth, L. C. ("any persons").
- (c) Copyhold customs are really only a method of dividing the ownership of the soil between the lord and his tenants; they bear little analogy to the so-called "freehold customs" treated in this Title. For the rules affecting copyhold customs, see *ante*, Title V, especially § 1091.

- (d) *Gatewara's Case* (1607) 6 Rep. 59 b.
Grimstead v. Marlowe (1792) 4 T. R. 717.
Lloyd v. Jones (1848) 6 C. B. 81.
Bland v. Lipscombe (1854) 4 E. & B. 713 n.
Allgood v. Gibson (1876) 34 L. T. 883.
Fitzhardinge v. Purcell [1908] 2 Ch., at p. 163, *per* Parker, J.
- (e) *Mills v. Mayor of Colchester* (1867) L. R. 2 C. P., at p. 484,
per Curiam.
Sowerby v. Coleman (1867) L. R. 2 Exch., at p. 100, *per* Chan-
 nell, B.
- (f) *Rogers v. Brenton*, *ubi sup.*, at p. 57.

[Customary rights of user stand midway between true easements (*ante*, §§ 1237-1251) and public rights in respect of land, which are not the subject of this work. They differ from the former, in that they are not claimed in respect of a dominant tenement (which every true easement is), and are, probably, inalienable and inextinguishable, except by statute. They differ from public rights, because they are restricted to a definite local class, and can be directly enforced by individuals, without the co-operation of the Crown or the Attorney General. Courts of First Instance have held that customary rights are not within the Prescription Act, 1832; notwithstanding the express words of s. 2 (*Mounsey v. Ismay* (1865) 3 H. & C. 486). But this view has been questioned in the Court of Appeal (*Mercer v. Denne* [1905] 2 Ch., at p. 586).]

1302. Such a claim must be reasonable in its character and extent — i. e. it must not tend to the destruction of the servient tenement or of the owner's beneficial enjoyment thereof. *Must be reasonable*

- Millechamp v. Johnson* (1746) Willes, 205 n.
- Taylor v. Devey* (1837) 7 A. & E. 409.
- Tyson v. Smith* (1838) 9 A. & E., at pp. 421-2, *per Curiam*.
- Sowerby v. Coleman* (1867) L. R. 2 Exch. 96.
- Hall v. Nottingham* (1875) 1 Ex. D., at p. 4, *per* Cleasby, B.

[It is on this ground that it has been held, that a claim by custom to a right in the nature of a *profit à prendre* is bad (*Sowerby v. Coleman*, *ubi sup.*, at p. 98). For examples of customary rights which have been regarded as reasonable, see Appendix to this Title.]

*No abandon-
ment*

1303. Customary rights once proved to exist can only be abolished by Act of Parliament; but long continued non-user may be evidence against the alleged existence of such rights.

Hammerton v. Honey (1876) 24 W. R., at p. 604, *per* Jessel, M. R.

[*Scales v. Key* (1840) 11 A. & E. 819, sometimes quoted as inconsistent with the latter part of this §, was not a case of custom affecting rights over land.]

ADDENDUM TO TITLE X

The following customary rights of user of land have been supported by the Courts.

1. A right to draw water from a spring for domestic purposes, (Such a right is not in the nature of a profit *à prendre*.)

Race v. Ward (1853) 4 E. & B. 702.

2. A right of way.

Foxall v. Venables (1590) Cro. Eliz. 180.

Brocklebank v. Thompson [1903], 2 Ch. 344.

3. A right to play games and indulge in pastimes to a reasonable extent.

Abbot v. Weekly (1665) 1 Lev. 176 (dances).

Fitch v. Rawling (1795) 2 H. Bl. 393 (cricket).

Mounsey v. Ismay (1863) 1 H. & C. 729 (horse races).

Hall v. Nottingham (1875) 1 Ex. D. 1 (dances).

4. A right to take walking (? riding) exercise.

Abercromby v. Fermoy Commrs. [1900] 1 Ir. R. 302.

[A *jus spatiiandi* cannot be acquired as a true easement (*International Tea Stores v. Hobbs* [1903] 2 Ch., at p. 172; *A. G. v. Antrobus* [1905] 2 Ch., at p. 198, *per* Farwell, J.).]

5. A right to deposit oysters or nets on the foreshore.

Truro Corporation v. Rowe [1901] 1 K. B. 870 (oysters).
Mercer v. Denne [1905] 2 Ch. 538 (nets).

6. A right to erect booths during a fair.

Tyson v. Smith (1838) 9 A. & E. 406.

[It may be doubted whether this right would, at the present day be recognized to the extent allowed in *Tyson v. Smith*. But it would probably be recognized in favour of a strictly limited class.]

7. A right to perambulate parish boundaries.

Goodday v. Michell (1595) Cro. Eliz. 441.

Taylor v. Devey (1837) 7 A. & E. 409.

[The customs by which the owner of a mill can compel the inhabitants of a district to bring their corn to be ground (*Cort v. Birkbeck* (1779) 1 Doug. 218; *Richardson v. Walker* (1824) 2 B. & C. 827), known in Scotland as "thirlage," and by which the inhabitants of a parish can compel the owner of the great tithes to keep a bull or boar for the use of the parish (*Launchbury v. Bode* [1898] 2 Ch. 120), cannot be properly classed as giving rise to customary rights of user of land, though they have a local operation.]

TITLE XI—EQUITABLE INTERESTS IN LAND

*Equitable
interest*

1304. An equitable interest in land is a right to some advantage derived from a corporeal or incorporeal hereditament, the legal ownership of which is vested, wholly or partially, in some person or persons other than the person or persons having the equitable interest.

[Equitable interests arose, as is well known, from the desire to create interests in land which, while conferring all the profitable consequences of land-ownership, should be free from the onerous features attaching to the legal estate. Such a desire was wholly inconsistent with feudal principles, and was, accordingly, for long ignored by the common law courts. But, favoured by the powerful protection of the Court of Chancery, the 'use, trust, or confidence' of land (as the early equitable interests were called) rapidly established itself in practice; and its existence was clearly recognized by the legislature before the end of the fourteenth century (cf. 50 Edw. III (1376) c. 6). From that date, despite the steady refusal of the common law courts to recognize them, uses of land occupied more and more of the attention of Parliament, which, instead of attempting to repress them, at first contented itself with gradually assimilating them to legal estates (e. g. 15 Ric. II (1391) c. 5, s. 4 (Mortmain); 1 Ric. III (1483) c. 1 (Sale); 4 Hen. VII (1488) c. 17 (Wardship); and 19 Hen. VII. (1503) c. 15 (Debts, Reliefs, Heriots, &c.)). Had this process been continued, the difference between the legal estate and the equitable interest would have gradually disappeared; but the exigencies of politics demanded a more drastic measure, and, in the year 1535, the Statute of Uses (27 Hen. VIII, c. 10) attempted to destroy equitable interests in land at a blow, by enacting (s. 1) that they should be deemed to be legal estates. As is well known, the statute in the end failed completely to effect this part of its object (if indeed its framers really had this

object in view). For the Court of Chancery, determined to preserve what had, in fact, become a national institution, ultimately enforced, as equitable interests, three classes of uses of land not 'executed' by the statute. These were — (i) uses of existing leaseholds (because no one could be 'seised' of a term of years), (ii) active uses, i. e. uses in which the feoffee, or legal owner, had active duties to perform, and (iii) 'uses upon uses,' i. e. uses limited out of previously created uses. All these are now, more commonly, called 'trusts'; but it is important to remember, that no technical words are necessary to express the idea of a fiduciary relation. Thus the institution of equitable interests recovered from what was at first thought to be a fatal blow, and indeed soon included interests protected by the Court of Chancery, but not created by way of trust, such as equities of redemption, and interests under contracts of sale and lease. Now that the onerous incidents attaching to the legal estate have largely disappeared, it has frequently been suggested that the separate existence of the equitable interest is unnecessary. But, in the absence of a system of hypothec, and a developed law of guardianship, it seems desirable to have some means by which married women, infants, and persons of unsound mind or feeble capacity, may derive maintenance from land, without being burdened with the cares of legal ownership. It should, however, be carefully remembered, as a matter of conveyancing, that a limitation of the first use ("to A. to the use of B.") still gives the *cestui que use* the legal estate by force of the statute, if in fact the donor had the legal estate.]

1305. Equitable interests in land may arise from: *Classes of equitable interests*

- (i) the limitation of any interest in land to a person or persons with the expressed or inferred intent that, or a declaration by the owner of any interest in land that, such interest shall be held in whole or in part for the benefit of some other person or persons (Trust);
- (ii) the limitation of any interest in land to a person or persons to secure the payment of money or money's worth (Right or Equity of Redemption);

- (iii) the making for value of a contract (express or implied) by the owner of any interest in land to transfer that interest or any less interest to another person;
- (iv) the creation by testamentary disposition, or by means of an agreement (express or implied), for value, by the owner of an interest in land, of any charge thereon, in favour of another person;
- (v) the negligent or fraudulent act of the owner of an interest in land, by reason whereof another person has reasonably believed himself to acquire, for valuable consideration, a legal interest in the land.

[In the above cases, (i) the person for whose benefit the limitation or declaration is made or deemed to be made, (ii) the person entitled to redeem the mortgaged property, (iii) the person who has contracted to acquire the interest, (iv) the person in whose favour the charge is agreed to be created, and (v) the person who has purchased in reliance on the conduct of the owner, are said to have equitable interests.]

*Similarity of
legal and
equitable
interests*

1306. Generally speaking, as regards rules of inheritance,^(a) limitation, and construction,^(b) rules of validity and invalidity,^(c) the varieties of interest which can be created,^(d) the incidence of curtesy, dower, and other similar claims,^(e) and the

liability for the debts of their owners,^(f) equitable interests are subject to the same law as the corporeal or incorporeal hereditaments out of which they are limited.

- (a) *Blunt v. Clark* (1657) 2 Sid. 61 (surrenderee of copyhold).
Blackburn v. Graves (1673) 1 Mod. 102 (do.).
Edwin v. Thomas (1687) 1 Vern. 489 (trust).
Fawcett v. Lowther (1751) 2 Ves. Sen., at p. 304, *per* Lord Hardwicke, C. (equity of redemption).
Trash v. Wood (1839) 4 My. & Cr. 324 (trust).
Re Hudson [1908] 1 Ch. 655 (trust).

[The exception from this rule is the case of the purely executory trust, which does not follow a special custom of descent (*Roberts v. Dixwell* (1738) 1 Atk. 607). An equitable interest in an incorporeal hereditament would be within the rule of the text; because the incorporeal hereditament itself would follow the descent of the servient tenement — at least where it issued out of the land (*Randall v. Jenkins* (1673) 1 Mod. 96; *Edwin v. Thomas*, *ubi sup.*, *per* Jeffreys, C.).]

- (b) E. g. the Rule in Shelley's Case (*Richardson v. Harrison* (1885) 16 Q. B. D. 85). But here, again, executory trusts are an exception; if the result of applying the rule would be to defeat the settlor's intention (*Roberts v. Dixwell*, *ubi sup.*). Also the Rule of Merger (*ante*, § 1041) applies where both interests are equitable, by analogy to law (*Brandon v. Brandon* (1862) 31 L. J. Ch., at p. 49, *per* Kindersley, V. C.); but, in the case of equitable interests, the Court is even readier than where the interests are legal, to find reasons for preventing merger (*Whittle v. Henning* (1848) 2 Ph. 731).

Re Averill [1898] 1 Ch. 523 (class gifts).

- (c) E. g. the Rule against Perpetuities (*Abbiss v. Burney* (1880) 17 Ch. D. 11), the so-called Rule against Double Possibilities (*Re Nash* [1910] 1 Ch. 1), the Rules against Accumulation (Accumulation Acts 1800 and 1892), the Rule against Mortmain and Charitable Uses (Mortmain Acts, 1888 and 1891).
- (d) It is every day practice to create equitable interests in fee simple, fee tail, for life, or years, present and future, out of socage or copyhold estates. With regard to equitable interests of inheritance in copyholds, it may be noted that they pass under the Land Transfer Act, 1897, s. 1, to the personal representatives of a deceased owner (*Somervill's* and *Turner's Contract* [1903] 2 Ch. 583), while legal estates of inheritance in copyholds do not. An

equitable socage interest in tail may be barred in the same way as the corresponding legal estate (Fines and Recoveries Act, 1833, s. 1, *ante*, §§ 1057-1064); an equitable entail of copyholds may be barred in the same way, except that the disentailing deed must be entered on the rolls of the manor (Fines and Recoveries Act, 1833, s. 53). But it is even possible to create equitable interests which have no corresponding legal estates, e. g. a life interest in leaseholds (*Re Betty* [1899] 1 Ch. 821); though much the same result may also be produced by an absolute bequest of leaseholds with an executory limitation over after the death of the legatee (*Re Giers* [1899] 2 Ch. 54). And in the latter case, at any rate if there is an express direction that he shall bear outgoing, acceptance of the bequest by the legatee "imposes in equity a personal obligation upon him" (*Re Loom* [1910] 2 Ch., at p. 233, *per Parker, J.*).

- (e) *Sweetapple v. Bindon* (1705) 2 Vern. 536 (curtesy).
Otway v. Hudson (1706) *ibid.* 584 (free-bench).
Watts v. Ball (1709) 1 P. Wms. 108 (curtesy).
Vaughan v. Atkyns (1771) 5 Burr. 2764 (free-bench).
 Dower Act, 1833, s. 2 (dower).
- (f) Statute of Frauds (1677) s. 10.
 Administration of Estates Act, 1833, s. 1.
 Judgments Act, 1838, s. 11.
Solley v. Gower (1688) 2 Vern. 61.

[Some technical differences, however, exist with regard to the manner of enforcing the liability, e. g. an equity of redemption cannot be seized under an Elegit; though a receiver may be appointed.]

But:—

- (i) there is no direct liability for incidents of tenure upon an equitable interest or the owner thereof;

Hall v. Bromley (1887) 135 Ch. D. 642.
Copestake v. Hoper [1908] 2 Ch. 10.

[As to escheat, see *post*, § 1307.]

- (ii) an equitable contingent remainder cannot fail by reason of the determination of the particular estate before the contingency happens.

Abbiss v. Burney (1880) 17 Ch. D. 211.

[A devise of a contingent remainder of real estate which passes to the personal representative under the Land Transfer Act, 1897, s. 1, will be treated as equitable for this purpose, even though the personal representative has assented to the devise before the particular estate determines (*Re Robson* [1916] 1 Ch. 116).]

1307. Where, after the 14th August, 1884, a person has died without heir and intestate in respect of any real estate consisting of an equitable interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person, such equitable interest will pass to the Crown.

‘Escheat’
of equitable
interest

Intestates’ Estates Act, 1884, s. 4.

[An equitable interest in leaseholds or other personal property would, in corresponding circumstances, pass to the Crown as *bona vacantia* (*Middleton v. Spicer* (1783) 1 Bro. C. C. 201; *Re Gosman* (1880) 15 Ch. D. 67).]

1308. Where the legal estate and a co-extensive and commensurate equitable interest in the same land become vested in the same person in the same right, the equitable interest is merged or extinguished in the legal estate.

Merger in
legal estate

Brydges v. Brydges (1796) 3 Ves. at p. 126, per Lord Alvanley, M. R.

Selby v. Alston (1797) *ibid.* 336.

Re Douglas (1884) 28 Ch. D. 327.

Re Selous [1901] 1 Ch. 921.

1309. No technical words are necessary, even in a conveyance *inter vivos*, for the limitation of an equitable interest of inheritance.^(a) But, in order that such an estate may pass by a conveyance *inter vivos*, it must be evident from the circumstances, or the

No techni-
cal words
necessary

expressions used, that such was the intention of the conveying party.^(b)

(a) *Re Tringham* [1904] 2 Ch. 487.

Re Oliver's Settlement [1905] 1 Ch. 191.

(b) *Whiston's Settlement* [1894] 1 Ch. 661.

Re Irwin [1904] 2 Ch. 752.

Re Thursby's Settlement [1910] 2 Ch. at p. 188, *per* Farwell, L. J.

[In *Re Irwin*, *ubi sup.*, the Court suggested as evidence of intention to pass an interest of inheritance (in addition to actual expressions in the conveyance), — (i) a reference to other property disposed of absolutely, (ii) the giving of valuable consideration by the purchaser. But in *Re Monckton* [1913] 1 Ch. 636, Sargant, J., held that this inference could only be drawn in limitations of beneficial interests.]

*No right of
possession*

1310. The owner of a present equitable interest is not entitled as of right to possession of the land, or the custody of the title deeds. But he may be put into possession of the land, and allowed the custody of the title deeds, at the discretion of the Court.

Re Burnaby's Settled Estates, (1889) 42 Ch. D. 621.

Re Wyibes [1893] 2 Ch. 369.

Re Bagot [1894] 11 Ch. 177.

Re Newen [1894] 2 Ch. 297.

Re Richardson [1900] 2 Ch. 778.

[The Court has been much more inclined to exercise its discretion in favour of the equitable owner since the passing of the Settled Land Acts (*Re Richardson*, *ubi sup.*), at p. 785, *per* Stirling, J..]

*No power to
affect legal
estate*

1311. The owner of an equitable interest cannot, except under statutory powers, make any disposition affecting the legal estate in the land.

Corbett v. Plowden (1884) 25 Ch. D. 678.

Keith v. Garcia & Co. [1904] 1 Ch. 774. (This case shows, however,

that the owners of the legal estate may by conduct adopt the disposition by the equitable owner, and thus make it binding on themselves.)

[Well-known statutory exceptions are (i) the Conveyancing Act, 1881, s. 18, conferring certain powers of leasing on a mortgagor in possession, (ii) the Settled Land Acts, 1882 to 1890, conferring large powers of disposition upon equitable limited owners, and (iii) the Agricultural Holdings Act, 1908, s. 12, entitling the tenant of a mortgagor to claim, as against a mortgagee who has taken possession of the land, six months' notice of termination of the tenancy, and other rights. These have been, or will be, treated of in their appropriate places. With regard to the powers of the equitable owner to take proceedings for recovery of possession of the land, see *ante*, Bk. II, Pt. III, § 825 (n).]

1312. Subject to express statutory provisions, if an *Patronage* interest which consists of or confers a right of patronage is legally vested in one person and equitably vested in another, the right of patronage must be exercised by the legal owner, but according to the wishes of the equitable owner.

Amberst v. Dawling (1700) 2 Vern. 401 (advowson).

Hill v. B. of London (1738) 1 Atk. 618 (do.).

Mackenzie v. Robinson (1747) 3 Atk. 559 (do.).

Barret v. Glubb (1776) 2 W. Bl., at p. 1053, *per* Grey, C. J. (do.).

Mott v. Buxton (1802) 7 Ves. 201 (stewardship of manor).

A. G. v. Forster (1804) 10 Ves., at p. 338, *per* Lord Eldon, C. (advowson).

1313. Subject to § 1321, no equitable interest, *Invalid against a legal purchaser for value* even though prior in point of date, can be enforced against any *bonâ fide* purchaser for value of an interest in the land in whom the legal estate, ^(a) or the best

right to call for it,^(b) is vested. For the purposes of this §, and §§ 1314, 1315, 1320, "value" means executed, but not executory, consideration.^(c)

- (a) *Millard's Case* (1678) 2 Freem. 43.
Mansell v. Mansell (1732) 2 P. Wms., at p. 681, *per Curiam*.
Willoughby v. Willoughby (1787) 1 T. R., at p. 771, *per Lord Hardwicke, C.*
Pilcher v. Rawlins (1872) L. R. 7 Ch. App. 260.
- (b) *Wilmot v. Pike* (1845) 5 Ha. 14 (express declaration of trust).
Hunter v. Walters (1871) 41 L. J. Ch. 175 (covenant to convey).
- (c) *Hardingham v. Nicholls* (1745) 3 Atk. 304.

[*Pilcher v. Rawlins* admirably illustrates the extreme strictness of this rule; for in that case the purchaser of the legal estate was unaware that he was acquiring it, and, if his belief as to the state of the title had been well-founded, he would not have acquired it. There is said, however, to be an exception from the rule in the case of a purchaser without notice from a purchaser who acquired with notice of a charitable trust (*East Greensted Case* (1633) Duke, 65; *Sutton Colefield Case* (1634) *ibid.* 68; *Commissioners of Donations v. Wybrants* (1845) 2 Jo. & La., at p. 198, *per Sugden, L. C. I.*].

Definition of
bonâ fide
purchaser

1314. For the purposes of § 1313 a *bonâ fide* purchaser for value means a person who has acquired an interest in the land, for value, without having, at the time when he gave the value, any notice (express, implied, or imputed) of the existence of the equitable interest which it is sought to enforce against him.^(a) It is immaterial, for the purposes of this rule, that such purchaser became aware of the existence of such equitable interest before he actually acquired the legal estate, or the right to call for it;^(b) provided that he acquired such legal estate or right

without causing or participating in a breach of trust as against the owner of the equitable interest.^(c)

- (a) *Le Neve v. Le Neve* (1747) 1 Ambl. 436.
Pilcher v. Rawlins, *ubi sup.*
- (b) *Brace v. Duchess of Marlborough* (1728) 2 P. Wms. 491.
Bailey v. Barnes [1894] 1 Ch. 25.

[These cases show that the legal estate may even be acquired *pendente lite*.]

- (c) *Mumford v. Stobwasser* (1874) L. R. 18 Eq. 556 (agreement to grant an underlease).
Taylor v. Russell [1892] A. C. 244. (This case shows that an unsatisfied mortgagee is not a trustee for this purpose.)
Perham v. Kempster [1907] 1 Ch. 373.

[It is doubtful whether the purchaser will be postponed to the equitable interest as participating in the breach of trust, if he was unaware that a breach of trust was being committed. In *Mumford v. Stobwasser*, *ubi sup.*, Jessel, M. R., seemed to think that he would; but see the cautious expressions of Lindley, L. J., in *Bailey v. Barnes*, *ubi sup.*, at p. 37.]

1315. A person who purchases for value the legal estate from a *bonâ fide* purchaser, as defined in § 1314, is also protected against a prior equitable interest, even though the second purchaser had notice of such equitable interest when he purchased; provided that such second purchaser was not himself a party to a fraud or breach of trust committed against the owner of the equitable interest. *Sub-purchaser*

- Lowther v. Carlton* (1740) Barn. Ch. 359.
- Sweet v. Southcote* (1786) 2 Bro. C. C. 66.
- Wilkes v. Spooner* [1911] 2 K. B. 473.

[This rule applies even where the owner of the equitable interest is a charity (*East Greensted Case* (1633) Duke, 64 (3); *Sutton Cole-*

field Case (1634), *ibid.*, 68). *Quære*: Is a volunteer, taking, with or without notice, from a purchaser without notice, in a similar position ?]

Notice

1316. A purchaser has express notice, for the purposes of § 1314, of an equitable interest, if, at the time when value was given by him, he was in fact aware of the existence of such interest. He has implied (or constructive) notice of such interest, if he would have discovered its existence, had such inquiries and inspections been made as ought reasonably to have been made by him. He has imputed notice of such interest, if, in the same transaction, such notice in fact came to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Conveyancing Act, 1882, s. 3.

Inquiries

1317. The inquiries and inspections referred to in § 1317 include: —

- (i) an investigation of the title to the property purchased, for the proper period, i. e. forty years prior to the date of the contract to purchase;

Re Cox and Neve [1891] 2 Ch. 109.

Nisbet's and Potts' Contract [1906] 1 Ch. 386.

[And the fact that the purchaser was precluded, as against the vendor, by contract, or even by statute, from investigating for such period, is immaterial for this purpose (*Imray v. Oakshette* [1897] 2 Q. B., at p. 229, *per* Rigby, L. J.).]

(ii) an inspection of the land itself;

Hunt v. Luck [1902] 1 Ch. 428.

[Generally speaking, a purchaser has constructive notice of the claims of all persons in possession, but not of their lessor's claims (*Hunt v. Luck*, *ubi sup.*, at p. 432, *per* Vaughan Williams, L. J.; *Green v. Rheinberg* (1911) 104 L. T. 149).]

(iii) an examination of the title deeds.

Worthington v. Morgan (1849) 16 Sim. 547.

Oliver v. Hinton [1899] 2 Ch. 264.

[But excessive precautions are not required; e. g. the fact that the mortgagee is the mortgagor's solicitor does not make it the duty of a purchaser from the mortgagee to make special inquiries as to whether the mortgage has been paid off (*Powell v. Browne* (1908) 97 L. T. 854).]

1318. The owner of an equity of redemption who repays part of the mortgage money, is not affected with notice of facts which he would have discovered had he investigated the mortgagee's title, when he made such partial repayment. *Mortgagor paying off*

Berwick & Co. v. Price [1905] 1 Ch. 632.

1319. Subject to § 1313, equitable interests rank *inter se* in order of the date of their creation.^(a) But fraud or negligence on the part of the owner of a *Priority among equitable interests*

prior equitable interest will cause him to be postponed to the owner of a later; if the owner of the later interest, being a *bonâ fide* purchaser for value, has been induced to acquire his interest by means of such fraud or negligence.^(b)

- (a) *Thorpe v. Holdsworth* (1868) L. R. 7 Eq. 139.
Walker v. Linom [1907] 2 Ch., at p. 114, *per* Parker, J.
- (b) *Rice v. Rice* (1853) 2 Drew, 73.
Layard v. Maud (1867) L. R. 4 Eq. 397.

[The rule in *Dearle v. Hall* (1825) 3 Russ. 1, which requires purchasers of equitable interests in chattels personal to give notice to the owners of the legal interest, on pain of losing priority over subsequent purchasers, has no application to equitable interests in land (*Union Bank of London v. Kent* (1888) 39 Ch. D., at p. 245, *per* Cotton, L. J.; *Taylor v. L. & County Bank* [1901] 2 Ch. 231). But an interest in the proceeds of the sale of land settled upon trust for sale is personalty within the rule in *Dearle v. Hall* (*Lloyd's Bank v. Pearson* [1901] 1 Ch. 865).]

Title deeds

1320. The owner of a legal estate can recover the title deeds of such estate from a *bonâ fide* purchaser for value of an equitable interest who had no notice of such legal estate when he gave value.^(a) But the Court will not deprive the latter of the title deeds in favour of the owner of a prior equitable interest.^(b)

- (a) *Re Ingham* [1893] 1 Ch. 352.
- (b) *Thorpe v. Holdsworth* (1868) L. R. 7 Eq. 139. (But see *Newton v. Newton* (1868) L. R. 4 Ch. App. 143.)

Postponement of legal estate

1321. A legal estate will also be postponed to an equitable interest inconsistent therewith, notwithstanding that the creation of the latter was subsequent to

the acquisition of the legal estate; if, by reason of the fraud^(a) or negligence^(b) of the owner of the legal estate, the equitable interest has been created in favour of, or has been acquired by, a *bonâ fide* purchaser for value without notice of the existence of the legal estate.

- (a) *Thatched House Case* (1716) 1 Eq. Ca. Ab., at p. 322, *per* Lord Cowper, C.
Anon., quoted by Lord Hardwicke, C., in *Arnot v. Biscoe*, (1748), 1 Ves. Sen., at p. 96.
Evans v. Bicknell (1801) 6 Ves., at p. 192, *per* Lord Eldon, C.
Barnett v. Weston (1806) 12 Ves., at p. 133, *per* Sir W. Grant, M. R.
Northern Counties Insurance Co. v. Whipp (1884) 26 Ch. D. 482.
- (b) *Perry-Herrick v. Attwood* (1857) 2 De G. & J. 21.
Briggs v. Jones (1870) L. R. 10 Eq. 92.
Clarke v. Palmer (1882) 21 Ch. D. 124.
Lloyds Banking Co. v. Jones (1885) 29 Ch. D. 221.
Walker v. Linom [1907] 2 Ch. 104.

[There is some doubt as to how far the negligence of a trustee binds his *cestui que trust*. Apparently, if it occurs before or at the acquisition of the legal estate it will bind (*Lloyds Banking Co. v. Jones* (1885) 29 Ch. D. 221; *Walker v. Linom*, *ubi sup.*). If it occurs afterwards, it will not (*Shropshire Ry. Co. v. Reg.* (1875) L. R. 7 H. L. 496; *Coleman v. L. and County Bank* [1916] 2 Ch. 353).]

TITLE XII—TENANCIES AT SUFFERANCE AND ADVERSE POSSESSION

*Tenant at
sufferance*

1322. A tenant at sufferance is a person who, having lawfully entered upon land in pursuance of a title by act of the parties,^(a) continues in possession thereof after his title has expired, without claim of right, and without the agreement of the person entitled to possession.^(b) There cannot be a tenant at sufferance of the Crown.^(c)

- (a) E. g. if a guardian in socage holds over after his ward comes of age, he is a mere trespasser (Co. Litt. 57 b.).
- (b) Co. Litt. 57 b.
Zouche's Case (1543) Dyer, 57 b.
Anon. (1571) Owen, 35. (In this case it was suggested that a tenant *pur autre vie* holding over was not a tenant at sufferance, but an intruder. See, however, the next two cases.)
Rouse's Case (1587) Owen, 27.
Allen v. Hill (1590) Cro. Eliz. 238.
Geary v. Bearcroft (1666) Cart., at p. 66, *per* Bridgman, C. J.
Thomasin v. Mackworth (1666) *ibid.*, at p. 78, *per eundem*.
Smartle v. Williams (1694) 1 Salk., at p. 246, *per* Holt, C. J.
- (c) *Sir Moil Finch's Case* (1590-1) 2 Leon., at p. 143, *per* Clark, B.

No profits

1323. A tenant at sufferance has no right to the profits of the land;^(a) but he cannot be treated as a trespasser.^(b) *Semble*, he may bring Trespass against a mere stranger.^(c)

- (a) *Anon.* (1502) Keilw. 47 a, *per* Frowike, C. J.
Pike v. Harsen (1591) 3 Leon. 233, *per* Wray, C. J.
Bennett v. Turner (1841) 7 M. & W., at p. 235, *per* Parke, B.
- (b) Co. Litt. 57 b.
Rouse's Case (1587) Owen, 28, *per Curiam*.
Trevillian v. Andrew (1697) 5 Mod. 384.

- (c) There seems to be a little doubt on this point. In *Rouse's Case*, *ubi sup.* (also reported 2 Leon. 45), the Court was divided in opinion whether a tenant at sufferance could justify distraining the beasts of a stranger, damage feasants. And it was said in *Preston v. Love* (n. d.) Noy, 120, that the reversioner might lease to another without entry on the tenant at sufferance; "for it is not out of his possession." But the report is bad.

1324. If a tenant at sufferance attempts to dispose of his interest, or to create estates out of it, his possession becomes adverse. *No power of alienation*

Rouse's Case, *ubi sup.*, at p. 28, *per totam Curiam*.

[This rule was of great importance before 1833 (Real Property Limitation Act, 1833, s. 39); owing to the effect produced on the claims of rightful owners by a 'descent cast,' i. e. the transmission of a tortious fee, gained by disseisin, to the heir of the disseisor (*Anon.* (1571) Owen, 35). And, even now, the point is important; regard being had to the great unwillingness of the Courts to allow a title by adverse possession to be claimed by a lessee against his lessor (*Archbold v. Scully* (1861) 9 H. L. C., at p. 375, *per* Lord Cranworth; *Walter v. Yalden* [1902] 2 K. B. 304, and *post*, § 1329).]

1325. No rent can be claimed, as such, from a tenant at sufferance; ^(a) but an action for use and occupation will lie against him. ^(b) If the person entitled to possession accepts rent, as such, from a tenant at sufferance, the latter becomes a tenant at will. ^(c) *Use and occupation*

- (a) *Anon.* (n. d.) 1 Brownl. 30.
Whitgift v. Barrington (1622) Winch, at p. 32, *per* Winch, J.
 (b) *Bromefield v. Williamson* (1654) Sty. 407.
Bayley v. Bradley (1848) 5 C. B. 396.
Leigh v. Dickeson (1884) 15 Q. B. D. 60. (But only by waiving the tort, and, therefore, only up to the date of notice in ejectment (*Birch v. Wright* (1786) 1 T. R., at p. 387, *per* Buller, J.).)

[This rule, about which there is some little doubt, has lost much of its importance by the passing of the Landlord and Tenant Act, 1730, s. 1, which provides the superior remedy described in the next §. But there may be some cases which do not fall within the statute.]

- (c) *Anon.* (1573) 4 Leon. 35.
Green's and Moody's Case (1627) Godb. 384.
Taylor v. Seed (1696) Comb. 383.

[If the tenant claims an interest for a specific number of years, acceptance of rent admits his claim (*Green's and Moody's Case*, *ubi sup.*, subject, however, now, presumably, to the Statute of Frauds (1677), s. 1).]

*Holding
over*

1326. Any tenant for term of life, lives, or years, or any person coming into possession through such tenant, who wilfully holds over any land after the determination of such term, and after demand of possession and notice in writing by the person entitled to possession, or his agent, is liable to pay double the yearly value of such land to the person so kept out of possession, for so long as such land is detained.

Landlord and Tenant Act, 1730, s. 1.

*Liability for
damage*

1327. A tenant at sufferance is liable to the person entitled to possession of the premises for all damage done by him to the premises; but (*semble*) not for permissive waste.

West v. Treude (1630) Cro. Car. 187. (But this was more like a tenancy at will.)

1328. A person who takes possession of land, claiming to hold it as his own, acquires an interest valid as against all persons other than those legally entitled, mediately or immediately, to possession.^(a) Possession is *prima facie* evidence of seisin in fee simple absolute ^(b) (*ante*, § 1048). *Adverse possession*

- (a) *Asher v. Whitlock* (1865) L. R. 1 Q. B. 1.
Perry v. Glissold [1907] A. C. 73.
- (b) *Wallwyn v. Lee* (1803) 9 Ves., at p. 31, *per* Lord Eldon, C.
Peaceable v. Watson (1811) 4 Taunt. 16.
Doe v. Penfold (1838) 8 C. & P. 536.
Busher v. Thompson (1846) 4 C. B., at p. 59, *per* Coltman, J.
Asher v. Whitlock, *ubi sup.*, at p. 6, *per* Mellor, J.

1329. For the purposes of the Statutes of Limitation, the possession of a person who claims under a lease is not adverse to the lessor during the existence of the term; even though no rent is paid and no acknowledgment given by the person in possession.^(a) And a person who acquires possession against a lessee, does not acquire adverse possession against the lessor, until the expiry of the lease; even though no rent is paid or acknowledgment given by such person.^(b) But the possession of a tenant at will becomes adverse to his lessor either at the actual determination of his tenancy, or at the expiration of one year from the commencement thereof (which-ever first happens).^(c) *Statutes of Limitation*

- (a) *Archbold v. Scully* (1861) 9 H. L. C., at p. 375, *per* Lord Cranworth.

- (b) Real Property Limitation Act, 1874, s. 2.

Walter v. Yalden [1902] 2 K. B. 304. (This case is very strong ; because the owner of the term had surrendered it to the lessor more than twelve years before the action was brought. *Quære* : whether this is consistent with the words of the section.)

[It would seem that a similar doctrine as to copyholds and the lord of the manor might be deduced from *Ecclesiastical Commissioners v. Parr* [1894] 2 Q. B. 420.]

- (c) Real Property Limitation Act, 1833, s. 7. (The words within brackets are not in the Act.)

*Liabilities of
adverse
possessor*

1330. A person who takes possession of land without title is subject to all liabilities, legal and equitable, which affected the estate of the owner at the time when adverse possession was acquired ; and all persons claiming under him are similarly subject, except that, as regards equitable liabilities, the defence of *bonâ fide* purchaser for value (*ante*, § 1314) may be pleaded by them.

Nisbet's and Potts' Contract [1906] 1 Ch. 386.

*Possession
must be
effective*

1331. Possession without title, to be adverse, must be effective in respect of all parts of the land in respect of which it is claimed to be adverse.

Ashton v. Stock (1877) 6 Ch. D. 719.

Thompson v. Hickman [1907] 1 Ch. 550.

Glyn v. Howell [1909] 1 Ch. 666.

[The judgments in the first two cases appear to lay it down, but without stating reasons, that mere wrongful working of minerals can never confer a title by possession. But this doctrine seems to be quite inconsistent with the decision in the last case.]

1332. Adverse possession may be transferred and transmitted, both before as well as after the right of the owner or former owner is barred by lapse of time, in the same manner as a lawful estate.^(a) But if a person holding possession without title abandons such possession, the statutory period of limitation will cease to run against the owner, and will recommence *de novo* on the taking of possession by another adverse possessor.^(b)

(a) *Goody v. Carter* (1847) 9 Q. B. 863.

Asher v. Whitlock (1865) L. R. 1 Q. B. 1.

Nisbet's and Potts' Contract [1906] 1 Ch. 386.

(b) *Trustees' & Exors' Co. v. Short* (1888) L. R. 13 App. Ca. 793 (P. C.).

1333. A person who takes and holds possession of land without title, whether he acted in good faith or not, is liable, on ejectment by the person entitled to possession, to account for the mesne profits (*ante*, Bk. I, §§ 45, 46) arising during his possession. But if he has acted reasonably and in good faith, he will be allowed credit for all necessary expenses incurred in taking such profits.

Goodtitle v. Tombs (1770) 3 Wils. 118.

Martin v. Power (1839) 5 M. & W. 351.

Jegon v. Vivian (1871) L. R. 6 Ch. App. 742.

Ashton v. Stock (1877) 6 Ch. D. 719.

[*Jegon v. Vivian* shows, that the fact that the defendant knew that there was a doubt on the title, does not prevent him claiming the allowance of expenses on the ground of *bona fides*. *Quære*: does

C C

the main doctrine of the § apply to anything except a trespass? Certainly under the old law mesne profits could not be recovered in Ejectment, but only by a supplementary action of Trespass. See, however, the reasons given for this peculiarity by Wilmot, C. J., in *Goodtitle v. Toms*, *ubi sup.*]

SECTION II

RIGHTS AND LIABILITIES OF OCCUPIERS OF LAND

TITLE I—AS REGARDS THE PUBLIC

1334. As between himself and the public, and the occupiers of other land generally (whether neighbours or not), the occupier of land may, subject to the provisions of this Title, and to any special rights acquired by the public or the Crown¹ or any person, under Act of Parliament, charter, dedication, grant, custom, or other lawful title, deal with the land in any way which does not create a nuisance (*ante*, Bk. II, Part III, Sect. II, Tit. I). In particular :—

- (i) he has the exclusive right to the possession of the land, and the remedies for interference therewith specified in Bk. II, Pt. III, Sect. II, Tit. I (Trespass to Land);
- (ii) he has the exclusive right to catch, kill, and appropriate all animals *feræ naturæ* being on the land, which are fit for the food of man ;

Hannam v. Mockett (1824) 2 B. & C. 934.

Blades v. Higgs (1865) 11 H. L. C., at p. 631, *per* Lord Westbury, C.

[Such animals, if killed on the land by a trespasser, or otherwise unlawfully, become at once the property of the occupier (*Sutton v.*

Moody (1697) 1 Ld. Raym. 250; *Blades v. Higgs, ubi sup.*, at p. 632). There seems to be no authority as to the title to other wild animals improperly killed on the land. But, of course, in most cases such killing would involve a trespass.]

- (iii) he cannot bring an action merely for frightening away wild animals, not being fit for food,^(a) nor for enticing away game;^(b) but he can bring an action for frightening away game from the land;^(c)

(a) *Hannam v. Mockett, ubi sup.*

(b) *Ibbotson v. Peat* (1865) 3 H. & C., at p. 650, *per* Bramwell, B.

(c) *Ibbotson v. Peat, ubi sup.*

- (iv) he has (*semble*) property in, or at least possession of, the young of wild birds hatched on the land, so long as they remain incapable of flight;

Bishop of London's Case (1522) Y. B. 14 Hen. VIII Mich. pl. 1, *per* Pollard, J.

Case of Swans (1592) 7 Rep., at 17 b.

- (v) he may (*semble*) destroy domesticated animals unlawfully coming upon the land, in the circumstances specified in § 785, *ante*;

Bk. II, Pt. III, Sect. I, Tit. I.

- (vi) he has the exclusive right to fish in any non-tidal water flowing over the land;

Blower v. Ellis (1886) 50 J. P. 326.

Micklethwait v. Vincent (1892) 67 L. T. 225;

- (vii) he has the right to take and use, to a reasonable extent, the water of any natural stream flowing in a defined channel past

or over (? or under) the land, whether such taking prejudicially affects the enjoyment of other persons or not, and for this purpose to have the water maintained in its natural condition and purity;^(a) and also to have the natural flow of the water free from interference by the act of any other person, not being a riparian occupier exercising the right immediately above described;^(b)

- (a) *Miner v. Gilmour* (1858) 12 Moo. P. C. at p. 156, *per* Lord Kingsdown.
Young & Co. v. Bankier Distillery Co. [1893] A. C. 491.
Jones v. Llanwrust U. C. [1911] 1 Ch. 393.
- (b) *Fear v. Vickers* (1911) XXVII T. L. R. 558 (C. A.).

(viii) he has the right to abstract all water flowing over^(a) or through^(b) the land in undefined channels, whether such abstraction prejudicially affects other persons or not;

- (a) *Rawstron v. Taylor* (1855) 11 Exch. 369.
Broadbent v. Ramsbotham (1856) *ibid.* 602.
- (b) *Popplewell v. Hodgkinson* (1869) L. R. 4 Ex. 249.
English v. Metro. Water Board [1907] 1 K. B. 588.

[On the other hand, an occupier of land is not entitled, by draining silt from his soil, to deprive the soil of another of its natural support (*Jordeson v. Sutton Gas Co.* [1899] 2 Ch. 217).]

(ix) he has the exclusive right of working and carrying away all minerals in the land,^(a) and the right to the possession of all objects found on or in the land, whose

owners cannot be identified,^(b) except (*semble*) such as are found on land to which the public has access;^(c)

- (a) *Keyse v. Powell* (1853) 2 E. & B. 132.
Ashton v. Stock (1877) 6 Ch. D. 719.
- (b) *South Staffordshire Water Co. v. Sharman* [1896] 2 Q. B. 44.
- (c) *Bridges v. Hawkesworth* (1851) 21 L. J. Q. B. 75.

(x) he is entitled to protect his land against any reasonably apprehended danger, not being caused by his own act or unlawful omission, even though the result of such protection is to cause loss to other persons.

- R. v. Fagham Commissioners* (1828) 8 B. & C. 355 (sea).
- Nield v. L. & N. W. R.* (1874) L. R. 10 Ex. 4 (flood water).
- Greyvensteyn v. Hattingh* [1911] A. C. 355 (locusts) (P. C.).

[This right does not include the right to divert or impede the course of a natural stream (*Menzies v. Breadalbane* (1828) 3 Bligh, N. S. 414), nor the right to divert mischievous substances, which have actually reached the land, on to the land of another person. (*Whalley v. L. & Y. Ry. Co.* (1884) 13 Q. B. D. 131).]

*Access to
public way,
or sea*

1335. The occupier of land abutting on a public way (whether a road or path,^(a) a river,^(b) or a lake),^(c) or on the sea,^(d) has a right of free access from the land to the way or sea, and from the way or sea to the land. If this access is interfered with, the occupier has a right of action for damages;^(e) but it is doubtful whether a mere interference with the resort of

RIGHTS AND LIABILITIES OF OCCUPIERS 773

customers to the land by the way or sea, gives the occupier a right of action.

- (a) *St. Mary Newington v. Jacobs* (1871) L. R. 7 Q. B. 47.
Benjamin v. Storr (1874) L. R. 9 C. P. 400.
Fritz v. Hobson (1880) 14 Ch. D. 542.
- (b) *Rose v. Groves* (1843) 5 Man. & G. 613.
D. of Buccleuch v. Metro. B. W. (1871) L. R. 5 H. L., at p. 463,
per Lord Cairns.
Lyon v. Fishmongers' Co. (1876) L. R. 1 App. Ca. 662.
Hindson v. Ashby [1896] 2 Ch. 1.
- (c) *Marshall v. Uleswater Steam Navigation Co.* (1871) L. R. 7 Q. B.,
at p. 172, *per Blackburn, J.*
- (d) *A. G. v. Wemyss* (1888) L. R. 13 App. Ca. 192.
Mellor v. Walmsley [1905] 2 Ch., at p. 175, *per Stirling, L. J.*

[These cases show, that the right of access is not destroyed by the fact that, owing to the action of the water, a strip of land is left dry between the occupier's boundary and the water. Care must be taken to distinguish between the right of the occupier, as a member of the public, to use the way, and his private right, as an occupier, to have access to it (*A. G. v. Thames Conservators* (1862) 1 H. & M. at p. 32, *per Wood, V. C.*; *Chaplin & Co. Ltd. v. Westr. Corpn.* [1901] 2 Ch. 329).]

- (e) *Rose v. Groves*, *ubi sup.* (special damage need not be proved).
- (f) *Wilkes v. Hungerford Market Co.* (1835) 2 Bing. N. C. 281. } (aff.).
Rose v. Groves, *ubi sup.* }
Ricket v. Metro. Ry. Co. (1867) L. R. 2 H. L., at p. 188. } (diss.).
Beckett v. M. R. Co. (1867) L. R. 1 C. P., at p. 100. }

1336. The occupier of land is liable to be re- *May not*
strained by injunction at the suit of the Crown, if *remove*
he attempts to remove a barrier which protects other *barrier*
land from the inroads of the sea. *against sea*

A. G. v. Tomline (1880) 14 Ch. D. 58.

*Liability
for defects*

1337. The occupier of land is liable in respect of damage suffered by persons coming upon the land, in consequence of defects or dangers in or upon the premises, to the extent specified in § 731 (iii), *ante*.

Bk. II, Pt. III, Sect. I. Tit. I.

Fences

1338. The occupier of land is not bound to fence against the public; even where the land adjoins a highway.^(a) But, if he does not, he is not entitled to claim damages for injury committed to the land by domesticated animals being lawfully upon the highway, which stray on to the land.^(b)

(a) *Cornwell v. Metro. Commrs.* (1855) 10 Exch., at p. 773, *per* Pollock, C. B.

Hardcastle v. S. Y. Ry. Co. (1859) 4 H. & N. 67.

Binks v. S. Y. Ry. Co. (1862) 3 B. & S. 244.

Cox v. Burbidge (1863) 13 C. B. N. S. 430.

Ellis v. Banyard (1911) XXVIII T. L. R. 122.

[But see the concluding remarks of Vaughan Williams, L. J., in the last case.]

(b) Bk. II, Pt. III, Sect. I, Tit. V, § 779.

*Dangerous
substances*

1339. An occupier of land is not responsible for injury caused by dangerous substances naturally growing on the land to (persons or) animals unlawfully coming on the land.^(a) But an occupier of land who brings and keeps thereon dangerous animals or substances which escape and cause injury, is

liable to the persons injured to the extent specified in § 852.^(b)

(a) *Ponting v. Noakes* [1894] 2 Q. B. 281.

(b) *Ante*, Bk. II. Pt. III. Sect. II, Tit. I.

[The latter doctrine has no application to substances not brought on to the land by the occupier, *e.g.*, thistles (*Giles v. Walker* (1890) 24 Q. B. D. 656).]

1340. An occupier of land who sets traps or *Traps and spring guns* spring guns on the land (even with a view of protecting it from trespassers) without giving notice of the existence of such instruments, is liable for any injuries suffered by persons or animals, whether trespassers or not, in consequence of such setting.^(a) And an occupier of land who baits such traps in such a manner as to attract dogs (? other animals) on to the land, is liable to the owners of such dogs (? other animals) for any consequent injuries suffered by them.^(b)

(a) *Deane v. Clayton* (1817) 7 Taunt. 489 (Court equally divided).

Ilott v. Wilkes (1820) 3 B. & Ald. 304 (notice).

Bird v. Holbrook (1828), 4 Bing. 628.

Jordin v. Crump (1841) 8 M. & W. 782 (notice).

[The common law rule does not seem to be affected by the existence of legislation making it a criminal offence to set engines dangerous to human life or limb (Offences Against the Person Act, 1861, s. 31); for *Jordin v. Crump* was decided after such legislation came into force by the 7 & 8 Geo. IV (1827) c. 18, s. 1.]

(b) *Townsend v. Watken* (1808) 9 East, 277.

1341. An occupier of land is liable for all damage *Fire* done by the escape of fire which he has lit, or

caused to be lit, or negligently produced, on the land.^(a) But he is not liable for damage caused by the escape of a fire which accidentally begins on the land.^(b)

- (a) *Tubervil v. Stamp* (1697) 1 Salk. 13.
Vaughan v. Menlove (1837) 3 Bing. N. C. 468.
Filliter v. Phippard (1847) 11 Q. B. 347.
- (b) Fires Prevention (Metropolis) Act, 1774, s. 186. (This clause is not confined in its operation to the Metropolis (*Richards v. Easto* (1846) 15 M. & W. 244).)

[In *Filliter v. Phippard*, *ubi sup.*, at p. 357, Lord Denman, C. J., criticising Blackstone's contrary view (*Comm.* I, 431), points out, that no fire can be said to 'begin accidentally' which is lit by the defendant or by his orders. It was formerly held, that a railway company, having express statutory powers to run locomotives, was not liable, apart from negligence, for damage caused by sparks from such locomotives (*Vaughan v. Taff Vale Ry. Co.* (1860) 5 H. & N. 679). But this rule has been altered, so far as regards claims not exceeding £100 for damage to agricultural land or crops, by the Railway Fires Act, 1905, s. 1.]

1341A. The occupier of land is, *primâ facie*, liable to discharge all public burdens lawfully imposed upon the land.

- R. v. Toddington* (1818) 1 B. & Ald. 565.
- R. v. Sutton* (1835) 1 A. & E. 597.

[Of course the owner may also be liable; and the burden may be expressly imposed upon him (cf. the case of Property Tax).]

TITLE II — AS REGARDS NEIGHBOURS

1342. Land may be divided, for legal purposes, *Division of land*
vertically or horizontally.

[The general proposition needs no authority; but it may be pointed out, that the horizontal division may be made above the surface as well as below it, e. g. in the case of separate ownership of flats or chambers in a large block, or even of an air space (*Reilly v. Booth* (1890) 44 Ch. D. 12).]

1343. There is a presumption that the occupier *Presumption of occupation*
of the surface of land is also occupier of the sub-soil to an unlimited depth.

Keyse v. Powell (1853) 2 E. & B., at p. 144, *per Curiam*.

Seddon v. Smith (1877) 36 L. T. 168.

Mitchell v. Mosley [1914] 1 Ch., at p. 450.

[But the presumption may be rebutted by circumstances, e. g. when a street or road is vested by statute in a public authority, so much only of the actual soil is vested as may be necessary for the purpose of preserving and maintaining and using it as a street or road; and it is sometimes extremely difficult to tell how far down the rights of the public authority extend (*Tunbridge Wells v. Baird* [1896] A. C. 434). And the presumption has no application as between landlord and tenant for years (*Elwes v. Brigg Gas Co.* (1886) 33 Ch. D. 562, and *ante*, § 1138).]

1344. When lands in the occupation of different *Boundaries*
persons are divided by a non-tidal river ^(a) or a road ^(b)

(whether public or private), the presumption is that the boundary between them is, as regards the sub-soil, the *medium filum* of the river or road.

- (a) *Bickett v. Morris* (1866) L. R. 1 H. L. (Sc.) 47.
Blount v. Layard (1888) [1891] 2 Ch., at p. 1689 n, *per*
 Bowen, L. J.

[Neither riparian owner may, however, obstruct or divert the passage of the stream by building out into the bed (*Bickett v. Morris*, *ubi sup.*).]

- (b) *Doe v. Pearsey* (1827) 7 B. & C. 304 (country road).
Re White's Charities [1893] 1 Ch. 659 (street in town).
Holmes v. Bellingham (1859) 7 C. B. N. S. 329 (private road).
Land Tax Commissioners v. C. L. R. [1913] A. C. 364.

[And a conveyance of land abutting on such river or road will, unless there are expressions to the contrary, convey the soil as far as the *medium filum* (*Micklethwaite v. Newlay Bridge Co.* (1886) 33 Ch. D., at p. 145, *per* Cotton, L. J.). But the presumption may be rebutted by special circumstances (*Beckett v. Corporation of Leeds* (1871) L. R. 7 Ch. App. 421). For example, it has no application where the boundary is a railway (*Thompson v. Hickman* [1907] 1 Ch. 550).]

*Accretion
 of soil*

1345. Where a plot of land is bounded by a natural stream or the sea, and by natural causes the position of the water is imperceptibly changed, the boundary line is changed accordingly;^(a) unless (perhaps) there is a definite boundary-mark otherwise fixed.^(b) This rule applies to tidal, non-tidal, navigable, and non-navigable water.^(c)

- (a) *R. v. Yarborough* (1824) 3 B. & C. 91 (accretion from sea).
Re Hull & Selby Ry. (1839) 5 M. & W. 327 (loss).
Foster v. Wright (1878) 4 C. P. D. 438.

- (b) *Re Hull & Selby Ry.*, *ubi sup.*
A. G. v. Chambers (1859) 4 De G. & J., at p. 70, *per* Chelmsford, C.
Foster v. Wright, *ubi sup.*, at p. 447, *per* Lindley, J.
Hindson v. Ashby [1896] 2 Ch. 1 (doubtful).
(c) *Foster v. Wright*, *ubi sup.*, at p. 448, *per* Lindley, J.

[The rule has no application to sudden diversions (*Re Hull & Selby Ry.*, *ubi sup.*, at p. 332, *per* Abinger, C. B.). But the mere fact that the change can be identified by maps, etc., does not prevent it applying where the process of change is imperceptible (*Foster v. Wright*, *ubi sup.*, *Hindson v. Ashby*, *ubi sup.*). There seems to be no English decision on accretion in the case of lakes.]

1346. When lands are separated by a hedge and artificial ditch, the presumption is, that the boundary between them is on that edge of the ditch which is furthest from the hedge. *Hedge and ditch*

Vowles v. Miller (1810) 3 Taunt. 137, *per* Lawrence, J.
Doe v. Pearsey (1827) 7 B. & C., at p. 307, *per* Holroyd, J.
Henniker v. Howard (1904) 90 L. T. 157.

[The rule has (probably) no application to boundaries formed by natural watercourses (*Marshall v. Taylor* [1895] 1 Ch. 641); and there is no presumption as to the width of an artificial ditch (*Vowles v. Miller*, *ubi sup.*, at p. 38).]

1347. A tree growing near a boundary belongs, in the absence of special provision, to the occupier of the soil in which the main body of the tree is; notwithstanding that its branches overhang adjacent soil. If the main body extends across the boundary, *Boundary trees*

the tree will belong to the owners of the two plots as tenants in common.

Masters v. Pollie (1620) 2 Rolle Rep. 141, (doubtful).

Anon. (1622) *ibid.* 255.

Waterman v. Soper (1698) 1 Ld. Raym. 737.

Holder v. Coates (1827) Moo. & Malk. 112.

Lemmon v. Webb [1894] 3 Ch., at p. 20, *per* Kay, L. J.

[For the rights of an occupier whose land is overhung by the branches of his neighbour's tree, see *ante*, Bk. I, § 181.]

*Boundary
wall*

1348. Apart from Act of Parliament, a boundary wall is presumed to belong to the owners of the adjoining plots as tenants in common, in proportion as the base rests on each plot respectively.

Wiltshire v. Sidford (1827) 1 Man. & R. 404.

Cubitt v. Porter (1828) 8 B. & C. 257.

Standard Bank v. Stokes (1878) 9 Ch. D. 68.

Watson v. Gray (1880) 14 Ch. D. 192.

[Of course, the presumption may be rebutted by proof of circumstances shewing an intention to maintain each part of the wall as separate property (*Matts v. Hawkins* (1813) 5 Taunt. 20).]

Mines

1349. When a person is entitled, under a conveyance or exception, to all the mines or minerals in a piece of land, or to a mine of a particular mineral, he is entitled to the air-space occupied by such mines or minerals; but this rule does not apply to the conveyance or exception of a particular mineral.

Bowser v. Maclean (1860) 2 De G. F. & J., at p. 420, *per* Lord Campbell, C., as interpreted by

Eardley v. E. Granville (1876) 3 Ch. D., at p. 834, *per* Jessel, M. R.

RIGHTS AND LIABILITIES OF OCCUPIERS 781

Proud v. Bates (1864) 34 L. J. Ch. 406.

D. of Hamilton v. Graham (1871) L. R. 2 H. L. (Sc.) 166.

Batten v. Kennedy [1907] 1 Ch. 256.

[The rule does not apply to the air-space occupied by minerals which, by virtue of copyhold custom, belong to the lord of a manor. Therefore the latter, after working the minerals, has no right to use the space thus created for passing to tenements outside the manor (*Lewis v. Branthwaite* (1831) 2 B. & Ad. 437). It will, of course, be realized, that a grant or exception of mines and minerals themselves is a totally different thing from a grant of the profit à prendre described in § 1259, *ante*. The latter conveys an incorporeal, the former a corporeal hereditament.]

1350. The occupier of land has a right to the *Right of support* support of the soil in its natural condition by adjacent^(a) and subjacent^(b) land.

(a) *Corp'n. of Birmingham v. Allen* (1877) 6 Ch. D. 284.

Jordeson v. Sutton [1899] 2 Ch. 217.

(b) *Harris v. Ryding* (1839) 5 M. & W. 60. (But this was rather derogation from grant.)

Humphries v. Brogden (1848) 12 Q. B. 739.

Dixon v. White (1883) L. R. 8 App. Ca., at p. 842, *per* Lord Blackburn.

[If buildings are placed upon the land, the soil is no longer in its natural condition (*Wyatt v. Harrison* (1832) 3 B. & Ad. 871, and other cases). But if, at the time of the severance of the surface and the sub-soil, buildings were standing on the surface, the occupier of the surface has, in the absence of special circumstances, a right to the support of them by the sub-soil (*Bonomi v. Backhouse* (1858) E. B. & E. 628; *New Sharlston Co. v. Westmorland* (1900) 82 L. T. 725 (H. L.)). It is important to notice, that the duty of support only falls on the occupier of so much adjacent land as would suffice to support the land of the plaintiff in its natural state (*Corporation of Birmingham v. Allen, ubi sup.*). The right of support of buildings by buildings, and of new buildings by land, is discussed *ante*, § 1248. It is a true easement, which may be acquired by prescription. At one time, there seems to have been a doctrine,

that the owner of a building, as to which no right of support had been acquired by prescription or grant, was entitled to an action against his neighbour, if the latter, knowing of the existence of the building, negligently excavated his own land and caused the building to fall or be injured (*Chadwick v. Trower* (1839) 6 Bing. N. C. 1). But this doctrine seems now to be exploded (*Dalton v. Angus* (1881) L. R. 6 App. Ca., at p. 804, *per* Lord Penzance).]

*Mine owner
and surface*

1351. The owner of mines or minerals apart from the surface has not, in the absence of special circumstances,^(a) the right to enter upon or destroy the surface, in order to win the minerals.^(b) But he has the right to win such minerals in any reasonable manner without injury to the surface.^(c)

(a) E. g. such as those in *D. of Buccleuch v. Wakefield* (1870) L. R. 4 H. L. 377.

(b) *Bell v. Wilson* (1866) L. R. 1 Ch. App. 303, followed in *Hext v. Gill* (1872) L. R. 7 Ch. App. 699.
Butterknowle v. Bishop Auckland [1906] A. C. 305.

[This rule does not apply to the exercise of the rights of land-owners to minerals excepted from conveyances under the Railways Clauses Consolidation Act, 1845, ss. 77-79 (*Rudbon Co. v. G. W. R.* [1893] 1 Ch. 427, since followed).]

(c) *Rowbotham v. Wilson* (1860) 8 H. L. C., at p. 360, *per* Lord Wensleydale.

Whidborne v. Ecclesiastical Commrs. (1877) 7 Ch. D. 375.

Hayles v. Pease [1899] 1 Ch. 567. (In this case the mine owners had power to enter upon the surface.)

*Incidental
damage*

1352. The occupier of a mine may, as between himself and the occupier or owner of a subjacent mine, work out the whole of his minerals in a usual

and skilful manner; even though the result of such working may be to admit water to the upper mine and thence into the lower, or otherwise to damage the latter.

Smith v. Kenrick (1849) 7 C. B. 515.

Wilson v. Waddell (1876) L. R. 2 App. Ca. 95.

[It is very difficult to reconcile these decisions with those in *Baird v. Williamson* (1863) 15 C. B. N. S. 376, and *Crompton v. Lea* (1874) L. R. 19 Eq. 115; especially the latter. But the view of the Court in both those cases apparently was, that what the defendant was doing, or proposed to do, was a deliberate flooding of the plaintiff's mine. For the curious case in which the defendant's action abstracted brine from the plaintiff's mine, see *Salt Union v. Brunner Mond* [1906] 2 K. B. 822.]

1353. The occupier of land has no right, inde- Fences
pendently of statute, contract, prescription, or cus-
tom,^(a) to call upon his neighbour to erect or maintain
fences.^(b) But if a person lawfully sinks a shaft, or
opens a quarry, through or in the surface of the soil,
or occupies such shaft or quarry when made, he
must fence such shaft or quarry for the protection
of the occupier of the surface.^(c)

(a) *Keighley's Case* (1609) 10 Rep. 139 a
Star v. Rookesby (1710) 1 Salk. 335 } (prescription).

Lawrence v. Jenkins (1873) L. R. 8 Q. B. 274 }

Child v. Hearn (1874) L. R. 9 Ex. 176 (statute).

Firth v. Bowling Iron Co. (1878) 3 C. P. D. 254 (contract).

Coaker v. Willcocks [1911] 2 K. B. 124 (custom).

(b) *Boyle v. Tamlyn* (1827) 6 B. & C. 329. (This case and the next
show, that the mere fact of continually repairing a fence is not con-
clusive evidence of prescriptive liability to do so.)

Hudson v. Tabor (1877) 2 Q. B. D. 290.

[There is not even any liability implied from the fact that the claimant's land was demised to him by the adjoining occupier (*Erskine v. Adeane* (1873) L. R. 8 Ch. App. 756).]

- (c) *Sybray v. White* (1836) 1 M. & W. 435.
- Williams v. Groucott* (1863) 4 B. & S. 149.
- Hawkes v. Shearer* (1887) 56 L. J. Q. B. 284.

1353A. The occupier of land is not, in the absence of contract or special custom, liable to his neighbour for the consequences of mere omission to cultivate or manage his land in a husbandlike manner.

- Giles v. Walker* (1890) 24 Q. B. D. 652.
- Stearn v. Prentice* [1919] 1 K. B. 394.

[It may well be doubted whether this typically individualist doctrine will long remain in private law. It has already been overruled in the sphere of public law (Corn Production Act, 1917, s. 9).]

TITLE III — AS REGARDS PERSONS HAVING FUTURE INTERESTS

1354. The rights and liabilities of occupiers of *Waste* land, as regards persons having future or reversionary interests therein, are governed by the Law of Waste. Waste is either 'legal' or 'equitable.'

[For 'ameliorating waste,' see *ante*, § 1078.]

1355. Subject to § 1358, legal waste consists of *Legal waste* any act^(a) ('voluntary waste') or neglect^(b) ('permissive waste') which changes, or diminishes the value of, the inheritance.

- (a) *City of London v. Greyme* (1607) Cro. Jac. 182.
Darcy v. Askwith (1618) Hob. 234.
Simmons v. Norton (1831) 7 Bing. 640.
West Ham v. E. London Waterworks [1900] 1 Ch. 624.
Rose v. Hyman [1911] 2 K. B., at p. 243, *per* Cozens-Hardy, M. R.
- (b) *Anon.* (1564) Moo. 62.
Griffiths' Case (1564) *ibid.* 69.
Stickleborne v. Hatchman (1585-6) Owen, 43.

1356. Equitable waste consists of such acts as *Equitable waste* change the character or diminish the value of the

inheritance, and are an unconscientious abuse of the legal powers of the tenant.

Aston v. Aston (1749) 1 Ves. Sen. 264.

Burges v. Lamb (1809) 16 Ves. 174.

M. of Ormonde v. Kyndersley (1820) 5 Madd. 369.

Marker v. Marker (1851) 9 Hare, 1.

Micklethwaite v. Micklethwaite (1857) 1 De G. & J. 504.

Turner v. Wright (1860) Johns. 740.

Baker v. Sebright (1879) 13 Ch. D. 179.

[The conception of 'equitable waste' arose from the practice adopted by settlors of limiting life estates 'without impeachment of waste.' Such a limitation exempted the life tenants from all common law liability for waste, in respect even of active or 'voluntary' waste. But, in the leading case of *Vane v. Lord Barnard* (1716) 2 Vern. 738, the Court of Chancery assumed a power to restrain by injunction acts of malicious injury done by tenant for life 'without impeachment'; and such acts now even involve (in the absence of express justification) a legal liability in damages (Judicature Act, 1873, s. 25 (3)). Nevertheless, the term 'equitable waste' continues to be used.]

Articles
severed

1357. Things improperly severed from the freehold by a tenant impeachable for waste, or severed by tempest or other accident, belong to the owner of the first vested estate of inheritance in the land, and can be sued for by him in Trover against the tenant or a stranger.^(a) But where such things are lawfully severed by a tenant, the property therein vests in him.^(b)

(a) *Herlakenden's Case* (1589) 4 Rep. 62 a.

Paget's Case (1593) 5 Rep. 76 b.

Lewis Bowles' Case (1615) 19 Rep., at 81 b.

Berry v. Heard (1622) Cro. Car. 242.

Whitfield v. Bewit (1724) 2 P. Wms. 240.

Seagram v. Knight (1867) L. R. 2 Ch. App., at p. 632.

RIGHTS AND LIABILITIES OF OCCUPIERS 787

[The estate of a deceased tenant for life is liable for the proceeds of his waste (*M. of Ormonde v. Kynnersley* (1820) 5 Madd. 369).]

- (b) *Lewis Bowles' Case*, *ubi sup.*, at 82 b (overruling on this point *Herlakenden's Case*, *ubi sup.*).
Aston v. Aston (1749) 1 Ves. Sen., at p. 265, *per* Lord Hardwicke, C.

[The ordinary remedy for equitable waste was an account and impounding of the proceeds to follow the trusts of the settlement (*Honywood v. Honnywood* (1874) L. R. 18 Eq., at p. 31, *per* Jessel, M. R.). *Quære*: since the Judicature Act. For the case of collusion between a tenant for life and remainderman, see *Birch Wolfe v. Birch* (1870) L. R. 9 Eq. 683.]

1358. Nothing is waste which merely involves the reasonable user of the premises, or the taking of the ordinary profits of the soil,^(a) or which is necessary for the protection or proper management of the inheritance.^(b)

*Ordinary
use and
precautions*

- (a) *Barrett v. Barrett* (1627) Hetley, 34.
Phillips v. Smith (1845) 14 M. & W. 589.
Harris v. Ekins (1872) 26 L. T. 827.
Saner v. Bilton (1878) L. R. 7 Ch. D. 815.

[*Semble*, it is on this ground that a tenant, though not 'without impeachment,' is allowed to take the produce of periodical cuttings on 'timber estates,' i. e., lands customarily employed principally for the production of timber (*Bagot v. Bagot* (1863) 32 Beav., at pp. 517-18, *per* Romilly, M. R.; *Dashwood v. Magniac* [1891] 3 Ch. 306), and to work open mines. As to estovers, see §§1074, 1139, *ante*].

- (b) *Honywood v. Honnywood*, *ubi sup.*, at p. 311, *per* Jessel, M. R.
Tucker v. Linger (1883) L. R. 8 App. Ca. 508.

Fixtures

1359. Generally speaking, it is an act of waste to sever fixtures (Bk. I, § 42) from the freehold.

Co. Litt. 53 a.

But : —

- (i) a tenant for life ^(a) or years ^(b) may, during his term, or (in the case of tenant for life) within a reasonable time afterwards, ^(c) remove fixtures put up by him for purposes of trade, ornament, or domestic use ; doing no serious damage to the inheritance, and making good such damage as may be done ;

(a) *Lawton v. Lawton* (1743) 3 Atk. 13.

Re Hulse [1905] 1 Ch. 406.

(b) *Poole's Case* (1703) 1 Salk. 368.

Re Moser (1884) 13 Q. B. D. 738.

Lambourne v. McClellan [1903] 2 Ch. 268.

(c) *Leigh v. Taylor* [1902] A. C. 157.

Re Hulse, ubi sup.

- (ii) the tenant of a farm or lands, under the Landlord and Tenant Act, 1851, ^(a) and the tenant of an agricultural holding, under the Agricultural Holdings Act, 1908, ^(b) have such rights to remove fixtures as are specified in those statutes respectively ;

(a) S. 3.

(b) S. 21.

- (iii) the execution creditor of a tenant for years ^(a) (but not of a tenant for life) ^(b) may exercise the tenant's rights to remove fixtures.

(a) *Poole's Case, ubi sup.*

(b) *Winn v. Ingilby* (1822) 5 B. & Ald. 625.

NOTE.

[The liability for waste attaching to the various kinds of limited interests in land will be found specified under the respective Titles of Sect. I, *ante*, dealing with such interests. See especially, §§ 1049, 1076-1078, 1098, 1143, 1164, 1189 n. (c).]

ADDENDUM TO TITLE III

LEGAL WASTE

The following acts and omissions have been held or judicially stated to amount to legal waste : —

A — VOLUNTARY WASTE

1. Cutting timber.

- Skelton v. Skelton* (1677) 2 Swanst. 170 n.
Whitfield v. Bewit (1724) 2 P. Wms. 240.
Perrot v. Perrot (1744) 3 Atk. 95.
Hussey v. Hussey (1820) 5 Madd. 44.
Honywood v. Honywood (1874) L. R. 18 Eq. 306.

[As to what is 'timber,' see remarks of Jessel, M. R., in *Honywood v. Honywood*, *ubi sup.*, at p. 309, and *Dashwood v. Magniac* [1891] 3 Ch. 306. No trees other than oak, ash, and elm, can be timber, except by virtue of local custom. A curious point should be noticed. If the settlor excepts the trees from the tenant's estate, then cutting them is not Waste, but Trespass (*Lewknor's Case* (1586) 4 Leon. 162, 225; *Goodright v. Vivian* (1807) 8 East, 190). This was important when waste involved forfeiture; and, even now, may be material, e. g. on the Statutes of Limitation.]

2. Cutting other wood, in a way which a prudent owner of the inheritance would not follow.

- Sir George Stripping's Case* (1621) Winch, 15.
O'Brien v. O'Brien (1751) Ambl. 107.
Kaye v. Banks (1770) 2 Dickens, 431.
Chamberlayne v. Dummer (1792) 3 Bro. C. C. 549.
Honywood v. Honywood (1874) L. R. 18 Eq., at p. 310.

3. Destruction or alteration of buildings.

Cooke's Case (1581) Moo. 178.

City of London v. Greyne (1607) Cro. Jac. 181.

Gage v. Smith (1613) Godb. 209.

Green v. Cole (1670) 2 Wms. Saund. 252 ; 1 Lev. 309.

Young v. Spencer (1829) 10 B. & C. 145.

[Whatever may have been the case at one time, the erection of buildings is not now, *per se*, waste (*Jones v. Chappell* (1875) L. R. 20 Eq. 539).]

4. Ploughing up ancient meadow or pasture.

Maleverer v. Spinke (1537) Dyer, 35 a.

Lord Darcy v. Askwith (1618) Hobart, 234.

Atkins v. Temple (1625) 1 Rep. in Ch. 14 (ancient pasture).

Cole v. Peyson (1636) *ibid.* 1036 (do.).

Fermier v. Maund (1638) *ibid.* 116 (do.).

Goring v. Goring (1676) 3 Swanst. 661 (do. meadow).

Simmons v. Ngerton (1831) 7 Bing. 640.

[There is, however, a distinct reaction against this doctrine (*D. of St. Albans v. Skipwith* (1845) 8 Beav. 354 ; *Rush v. Lucas* [1910] 1 Ch. 437). And it has been greatly modified by s. 26 of the Agricultural Holdings Act, 1908.]

5. Opening new mines, or re-opening abandoned mines.

Saunders v. Marwood (1599) 5 Rep. 12 a.

Astrey v. Ballard (1676) Freem. K. B. 445.

Viner v. Vaughan (1840) 2 Beav. 466.

Bagot v. Bagot (1863) 32 Beav., at p. 516, *per* Romilly, M. R.

Clegg v. Rowland (1866) L. R. 2 Eq. 160.

Re Baskerville [1910] 2 Ch. 329.

[Whether a mine is 'open' or 'dormant' (abandoned) is a question of fact in each case (*Bagot v. Bagot*, *ubi sup.*). It is not waste for the tenant to sink new shafts or pits for the purpose of working open mines (*Clavering v. Clavering* (1726) 2 P. Wms. 388 ; *Cowley v. Wellesley* (1866) L. R. 1 Eq. 656 ; *Elias v. Snowden Quarries* (1879) L. R. 4 App. Ca., at p. 466, *per* Lord Selborne). But the bed of a stream is not an open mine ; and a tenant for years, impeachable for waste, who takes from it minerals deposited by the action of the stream, is guilty of waste (*Thomas v. Jones* (1841) 1 Y. & C. C. C. 510).]

B — PERMISSIVE WASTE

6. Failure to scour ditch, whereby foundations of house become rotten.

Stickleborne v. Hatchman (1585-6) Owen, 43.

7. Suffering buildings to be out of repair, whereby they are destroyed by weather.

Anon. (1564) Moo. 62.

8. Allowing a sea or river wall to become ruinous, whereby water enters and floods the land.

Griffiths' Case (1564) Moo. 69.

Anon. (1564) *ibid.* 62.

9. Suffering cattle to bite the germins of underwood which the tenant has felled.

Gage v. Smith (1613) Godb. 209.

10. Failure to cultivate an agricultural holding in a husband-like manner according to the custom of the country.

Wedd v. Porter [1916] 2 K. B. 91.

EQUITABLE WASTE

The following acts have been held to amount to equitable waste : —

11. Destroying or seriously damaging the principal mansion house.

Vane v. Lord Barnard (1716) 2 Vern. 738.

Rolt v. Somerville (1737) 2 Eq. Ca. Ab. 759.

D. of Leeds v. Amberst (1846) 2 Ph. 117.

[Where the settlor had virtually abandoned the mansion house before the date of the settlement, and the tenant for life pulled it down and used the materials for rebuilding, this was held not to be equitable waste (*Morris v. Morris* (1858) 3 De G. & J. 323).]

12. Cutting down trees planted or left by an absolute owner for ornament or shelter for the mansion house; (a) except for the purpose of preserving the remaining trees.(b)

- (a) *Abraham v. Bubb* (1680) 2 Freem. Ch. 53.
Lawley v. Lawley (1717) Jac. 71 n.
Packington's Case (1744) 3 Atk. 215.
M. of Downshire v. Sandys (1801) 6 Ves. 107.
Marker v. Marker (1851) 9 Ha. 1.
 (b) *Ford v. Tynte* (1864) 2 De G. J. & S. 127.
Baker v. Sebright (1879) 13 Ch. D. 179.

[Whether the trees are in fact ornamental or not, is immaterial (*Coffin v. Coffin* (1821) Jac. 70; *Wombwell v. Belasyse* (1825) 6 Ves. 110 n.). The question turns on the intention of the settlor.]

13. Cutting down thriving wood unfit for the purposes of timber.

- O'Brien v. O'Brien* (1751) 1 Ambl. 107.
Tamworth v. Ferrers (1801) 6 Ves. 419.
Smythe v. Smythe (1818) 2 Swanst. 251.

BOOK III

PROPERTY (*continued*)

A — LAND (*continued*)

SECTION III

RESTRICTIONS ON USER AND ALIENATION OF LAND

TITLE I—CONDITIONS

1360. Subject to §§ 1050, 1051, 1057, 1062, and 1079, a condition may be annexed to the holding of any interest in land. But the benefit of such condition can only be reserved in favour of the grantor, or of the grantor and his heirs, and not in favour of a stranger.

Litt. s. 347.
Co. Litt. 214.

[For the nature of, and general rules affecting conditions, see *ante*, Bk. I, Sect. III, Title III. Presumably, where the grantor has himself only a term of years, the benefit of the condition can be reserved to the grantor and his personal representatives.]

Remedy

1361. Where the happening of the condition renders the holder of the estate liable to be deprived of it entirely, and no other person is for the time being entitled to the possession or receipt of the profits of the land, the person entitled to enforce the condition may peaceably re-enter, or recover possession by an action in the nature of Ejectment.

Bk. II, Pt. III, Sect. II, Tit. II, *ante*.

Waiver

1362. The benefit of a condition may always be waived; ^(a) but the actual waiver of the benefit of any condition in any lease, on the part of the lessor, in any one particular instance, is not deemed to extend to any instance other than that to which it specially relates, unless an intention to that effect shall appear. ^(b)

- (a) This was doubtful at one time; and Coke thought (Co. Litt., 214 b) that the breach of a condition annexed to a lease for years, if appropriately worded, might *ipso facto* determine the lessee's estate. But the text expresses the modern view.

- (b) Law of Property Amendment Act, 1860, s. 6.

[This section is not very happily worded; but it has been thought better to follow the language of the statute. It will be observed that the section applies only to waivers (a) of forfeitures of 'leases,' (b) by lessors.]

Licence

1363. A licence to do an act which, but for such licence, would create a forfeiture under a condition reserved in any lease, will, if given to the lessee or

assignee of the lease, extend only to the specific act contemplated by the person giving the licence, and will not (unless otherwise specified in the licence) prejudice any proceeding for any subsequent breach.

Law of Property Amendment Act, 1859, s. 1.

1364. A licence to one of several lessees or co-owners of property comprised in a lease, to do any act prohibited to be done without licence, will not operate to destroy a right of re-entry in respect of any breach by his co-lessees or co-owners, or in respect of any breach by him in respect of any interest in such property not the subject of such licence. *Co-owners*

Ibid. s. 2.

[The three preceding §§ represent enactments rendered necessary by the existence of the strict rule of the common law, to the effect that a condition was 'indivisible,' i. e., once broken or dispensed with, was gone altogether (*Dumpr's Case* (1603) 4 Rep. 119 b; *Fox v. Whitchocke* (1614) 2 Bulstr. 290). The rule caused extreme inconvenience in practice, and worked harshly against the very persons whom it was intended to protect. It will be observed, that the statutory relaxations apply only to 'leases,' which probably includes grants of life estates.]

1365. Conditions are subject to the Rule Against Perpetuities (*post*, Sect. XV, Tit. III, and *ante*, Sect. I, Tit. VIII, § 1181). *Perpetuities*

Hollis Hospital Trustees' and Hague's Contract [1899] 2 Ch. 540.
Re Da Costa [1912] 1 Ch. 337.

Alienation

1366. The benefit of a condition in respect of future,^(a) and, in the case of leases, (*semble*) past breaches,^(b) may be disposed of by testament,^(c) or deed.^(d)

(a) *Hunt v. Bishop* (1853) 8 Exch. 675.

Hunt v. Remnant (1854) 9 Exch. 635.

Jenkins v. Jones (1882) 9 Q. B. D., at p. 131, *per* Jessel, M. R.

(b) Conveyancing Act, 1911, s. 2. (The Act is prospective only; and only applies to conditions passing with the reversion and enforceable for the benefit of the reversioner.)

(c) Wills Act, 1837, s. 3.

(d) Real Property Act, 1845, s. 6.

Severance

1367. Subject to Sect. I, Tit. VI, § 1146 (severance of reversions on leases), the severance, by act of the person in whose favour the benefit of the condition is reserved, of the interest to which such benefit is annexed, between two or more persons, whether as co-owners or otherwise, destroys the condition.^(a) This rule does not apply to severance by operation of law,^(b) nor to severance caused by the wrongful act of the person against whom the forfeiture is sought to be enforced.^(c)

(a) *Leeds v. Crompton* (1586) in 4 Rep., at 120 a.

Dumpor's Case (1603) 4 Rep., at 120.

(b) *Dumpor's Case*, *ubi sup.*

Moodie v. Garnon (1616) 1 Rolle Rep., at p. 331.

(c) *Knight's Case* (1585) Moo., at p. 203.

[The reason for the rule is said to be, that he who enters for condition broken, ought to be in of the same estate which he had at the time of the condition created (*Dumpor's Case*, *ubi sup.*).]

1368. When a lessor is proceeding to enforce, or *Relief (rent)* has enforced, a condition of re-entry on non-payment of rent, the Court may, at any time before the lapse of six months after the premises have been recovered in ejectment by the lessor, grant relief and restoration to the lessee or an under-lessee, on payment by such lessee or under-lessee of arrears of rent, interest, and costs.

Common Law Procedure Act, 1852, ss. 210, 212; 1860, ss. 1, 2.

Howard v. Fanshawe [1895] 2 Ch. 581.

Humphreys v. Morten [1905] 1 Ch. 739.

[No new lease is necessary (*Howard v. Fanshawe, ubi sup.*).]

1369. Subject to § 1371, no forfeiture for breach *Other con-* of a condition in a lease (other than a condition of re-
ditions entry on non-payment of rent) is enforceable until the lessor has served on the lessee or assignee of the lease a notice, specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee or assignee to remedy it, and, in any case, requiring the lessee or assignee to make compensation in money for the breach, and the lessee or assignee has failed within a reasonable time to remedy the breach (if capable of remedy), and, in any case, to make reasonable compensation therefor.

Conveyancing Act, 1881, s. 14 (1) (3).

During proceedings

1370. Even when a lessor is proceeding, by action or otherwise, to enforce a forfeiture for such breach, the Court may, subject to § 1371, on the application of the lessee or assignee, grant relief against such forfeiture, on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, as to the Court may seem fit.

Conveyancing Act, 1881, s. 14 (2).

Conveyancing Act, 1892, s. 4.

No relief

1371. The provisions of §§ 1369 and 1370 do not extend to any case in which forfeiture is claimed against a lessee, or assignee of a lease, on the ground of breach of a condition :

- (i) against assigning, under-letting, parting with the possession, or disposing, of the land leased ; *or*,
- (ii) subject to § 1373, against the bankruptcy of the lessee, or the taking in execution of the lessee's interest ; *or*,
- (iii) for allowing (in case of a mining lease) the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

Conveyancing Act, 1881, s. 14 (6).

1372. Where the lessor is proceeding to enforce a forfeiture for breach of a condition in the lease, even in the circumstances specified in § 1371,^(a) the Court may, on the application of an under-lessee, vest, for the whole term of the head lease or any shorter period (not being in either case longer than the unexpired term of the under-lease), the property comprised in the head lease, in such under-lessee, on such terms as the Court shall think fit.^(b) *Relief to under-lessees*

(a) *Cholmeley's School v. Sewell* [1894] 2 Q. B. 906.

Imray v. Oaksbette [1897] 2 Q. B. 218.

Gray v. Bonsall [1904] 1 K. B. 601.

(b) Conveyancing Act, 1892, s. 4.

[The discretion allowed to the Court by this enactment is, obviously, very wide; but in fact it is generally exercised only on the terms that the under-lessee shall, during the remainder of his term, accept responsibility for the liabilities of the head lease. It will not be exercised (? in cases falling within § 1371) in favour of an under-lessee who has been a party to a breach of condition in consequence of his failure to investigate his lessor's title (*Imray v. Oaksbette*, *ubi sup.*; *Matthews v. Smallwood* [1910] 1 Ch. 777).]

1373. The relief described in § 1370 may, notwithstanding the provisions of § 1371 (ii), be granted in the case of proceedings to enforce forfeiture of a lease on the ground of the bankruptcy of the lessee or the taking of his interest in execution. *Relief on terms*

But: —

- (i) it will not operate to suspend the forfeiture for more than one year from the date of the bankruptcy or execution, unless within

D D

that time the lessee's interest has been sold or absolutely contracted to be sold;

Conveyancing Act, 1892, s. 2 (2).

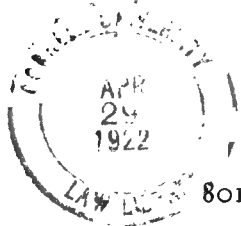
Re Henry Castle & Sons (1906) 94 L. T. 396.

(ii) it cannot be granted where property comprised in the lease sought to be forfeited is —

- (α) agricultural or pastoral land;
- (β) mines or minerals;
- (γ) a house used, or intended to be used, as a public house or beershop;
- (δ) a house let as a dwelling house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures;
- (ε) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or the character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

Conveyancing Act, 1892, s. 2 (3).

[There is no provision in the Act of 1892 for expanding the meaning of the word 'lessee' to include an assignee of the lease. But the statute is to be 'read together with' the Act of 1881 (Act of 1892, s. 1 (1)).]



CONDITIONS

1374. The provisions of §§ 1369–1373 apply to original and derivative under-leases, and to grants at fee farm rents, or securing rents by condition, and to agreements for leases or under-leases where the lessees or under-lessees are entitled to enforce the same; and the words ‘lessor,’ ‘lessee,’ and ‘under-lessee’ have corresponding meanings. *Meaning of ‘lease’*

Conveyancing Act, 1881, s. 14 (3).

Conveyancing Act, 1892, s. 5.

[Presumably, by a grant ‘securing a rent by condition’ is meant a grant under which rent is secured by means of a condition.]

1375. When an estate has been forfeited for breach of an express condition, any interest created out of it, by the former owner of the estate, even before the occurrence of the forfeiture, becomes (subject to § 1372) void as against the person entitled to enforce the forfeiture. *Title derived from forfeited estate*

Platt v. Sleap (1611) Cro. Jac. 275.

G. W. R. v. Smith (1876) 2 Ch. D., at p. 253, *per* Mellish, L. J.

Parker v. Jones [1910] 2 K. B. 32.

[This rule does not hold in forfeiture for breach of a ‘condition in law’ (*Archer’s Case* (1597) 1 Rep., at 67 a).]

TITLE II—COVENANTS (OTHER THAN COVENANTS IN LEASES) RUNNING WITH THE LAND

*Benefit runs
at law*

1376. The benefit of any covenant affecting the user of land, and intended to be beneficial to the user of other land, may be enforced by any owner or occupier of the last mentioned land who was contemplated as a beneficiary by the covenant ; whether such owner, or occupier, or his predecessor in title, was a party to the deed containing the covenant, or not, and whether he was aware of the existence of the covenant when he acquired his land, or not.

Real Property Act, 1845, s. 5.

Renals v. Cowlishaw (1878) 9 Ch. D. 125.

Rogers v. Hosegood [1900] 2 Ch. 388.

Dyson v. Forster [1909] A. C. 98.

[*Semble* : this doctrine is not confined to negative or restrictive covenants, at least where the Real Property Act applies.]

*In whose
favour*

1377. In order that the benefit of such a covenant may run with any land, it must have been made with or for the benefit of a person who had an interest in such land, and must affect the mode of occupation or the value of the land of the person seeking to enforce it.

Rogers v. Hosegood, *ubi sup.*, at p. 395.

Dyson v. Forster, *ubi sup.*, at p. 102.

Long v. Gray (1913) 58 Sol. Jo. 46.

COVENANTS RUNNING WITH THE LAND 803

[It was necessary, at law, that the person seeking to enforce the covenant should have acquired the actual estate of the original covenantee (*Webb v. Russell* (1789) 3 T. R. 393). But, probably, any one who was contemplated by the covenant, and has an interest in the land, may sue in equity (*Long v. Gray, ubi sup.*). A mere contract to purchase does not, however, enable the intending purchaser to bind the land (*Millburn v. Lyons* [1914] 1 Ch. 40).]

1378. The burden of such a covenant, not being a restrictive covenant,^(a) and not being made between lessor and lessee,^(b) does not run with the land either at law or in equity, i. e. it cannot be enforced against any owner of the land intended to be affected (other than the original covenantor and his personal representatives), whether such owner acquired his interest with knowledge of the covenant, or not. Burden does
not run

(a) *Haywood v. Brunswick Building Society* (1881) 8 Q. B. D. 403.
Austerberry v. Corp'n. of Oldham (1885) 29 Ch. D. 750, (over-
ruling *Cooke v. Chilcott* (1876) 3 Ch. D. 694).

(b) Covenants between lessor and lessee are dealt with in Sect. I, Title VI, § 1146, *ante*.

1379. The burden of such a covenant, being restrictive, even though not made between a lessor and a lessee, runs with the land in equity,^(a) but not at law ; i. e. it can be enforced by injunction (and, *semble*, by a judgment for damages^(b)), but only against a person who, being contemplated as being bound by the covenant, acquires an interest in the land of the original covenantor otherwise than as, or through, a Except in
equity

purchaser of the legal estate ^(c) for valuable consideration without notice of the covenant.^(d)

- (a) *Tulk v. Moxhay* (1848) 11 Beav. 571.
- (b) *Sayers v. Collier* (1884) 28 Ch. D. 103.
Wilkes v. Spooner [1911] 2 K. B., at p. 480, *per* Scrutton, J.
- (c) *Wilkes v. Spooner* [1911] 2 K. B. 473. (It is doubtful whether a purchaser who acquires without notice, but does not get the legal estate, is protected (*L. & S. W. R. v. Gomm* (1882) 20 Ch. D., at p. 583). On principle, he should not be.)
- (d) The general doctrine as to 'implied notice' of equities applies; e. g. a person who acquires the estate of the covenantor without investigating the title is bound, if, on the ordinary investigation, he would have discovered the equity (*Nisbet's and Potts' Contract* [1906] 1 Ch. 386).

[It is said by some text-book writers (e. g. Platt, *Covenants*, at p. 471) that the burden of covenants for title runs with the land at law; but there seems to be no decided case, and, probably, the doctrine is a survival of the learning of warranties. Certainly the ordinary covenant does not run with the land at law (*Austerberry v. Corp'n. of Oldham*, *ubi sup.*); and it was said by Leach, V. C., in *Barclay v. Raine* (1823) 1 Sim. & S. 449, that even a covenant to produce title-deeds does not so run. Of course a covenant by an ancestor could be enforced against his heir who had assets by descent; at any rate if the covenant was expressed to include heirs (*Cook v. E. of Arundel* (1656) Hardres, 87; *Dyke v. Sweeting* (1745) Willes, 587—the objection successfully taken in error in the K. B., reported in 1 Wils. 181, was purely technical). But, since the passing of the Land Transfer Act, 1897, s. 1, this right has become of less importance.]

*Building
scheme*

1380. The Court will presume an intention that covenants of the kind described in § 1376, being restrictive, shall run with the land, from the existence of a building scheme. To establish the existence of a building scheme, it must be proved:—

- (i) that the plaintiff and defendant acquired from a common vendor;
- (ii) that such vendor, prior to the sale to either party, (or his predecessor in title), laid out land, including the land of both parties, under a scheme intended to affect both;
- (iii) that such scheme was intended for the benefit of purchasers of all lots sold;
- (iv) that both parties, or their predecessors in title, purchased on that footing.

Elliston v. Reacher [1908] 2 Ch., at p. 384, *per* Parker, J., approved by C. A., *ibid.* 665.

1381. When the existence of a building scheme *Contracts* is established, a contract not to deal with any portion of the land included in the scheme (including plots not sold) in a manner inconsistent with the scheme, will be implied; and such contract will be enforceable and binding, in the same manner and to the same extent, as a restrictive covenant to that effect.

Mackenzie v. Childers (1889) 43 Ch. D. 265.
Elliston v. Reacher, *ubi sup.*

[*Semble* : it may bind the vendor as to sales of adjoining land, unless there is express provision to the contrary (*Osborne v. Bradley* [1903] 2 Ch., at p. 453).]

1382. The mere facts (i) that the observance of *Must be in-*
the covenant would benefit the land of the plaintiff,^(a) *tention to*
or (ii) that the defendant had notice of its existence *benefit*

when he acquired his land,^(b) will not, of themselves, entitle the plaintiff to enforce the covenant.

(a) *Reid v. Bickerstaff* [1908] 2 Ch. 305.

(b) *Willé v. St. John* [1910] 1 Ch. 325.

*Inconsistent
conduct*

1383. A change in the conditions of the neighbourhood will not affect the rights or liabilities under the covenant.^(a) But conduct on the part of the plaintiff inconsistent with the observance of the covenant,^(b) or acquiescing in the breach of the covenant,^(c) will deprive him of his equitable remedy.

(a) *Pulleyne v. France* (1913) 57 Sol. Jo. 173 (C. A.).

Ives v. Brown [1919] 2 Ch. 314.

[See, however, *Sobey v. Saintsbury* [1913] 2 Ch. 513.]

(b) *D. of Bedford v. British Museum* (1822) 2 My. & K. 552.

(c) *Sayers v. Collier* (1884) 28 Ch. D. 103.

*Not a per-
petuity*

1384. Covenants restricting the user of land are not void for perpetuity; even though no limits of time are fixed for their operation.

Keppell v. Bailey (1834) 2 My. & K., at p. 527, *per* Lord Brougham, C.
Mackenzie v. Childers (1889) 43 Ch. D. 265.

[The reason is, that such covenants do not create future interests, but only impose restrictions on existing interests.]

*Acts of
predecessors*

1385. A defendant who has acquired land on which a previous owner has erected a building in breach of a covenant such as that described in

§ 1379, is not liable to a mandatory order requiring him to remove it.

Powell v. Hemsley [1909] 2 Ch. 252.

[This case was very strong; because the defendant was himself the original covenantor. It seems to indicate an easy method of escape from the doctrine of *Tulk v. Moxhay*, when the restrictive covenant merely forbids the doing of a single act.]

NOTE.

There seems to have been no judicial decision or dictum as to the extent to which restrictions can be imposed upon land by covenants of the kind described in § 1379.

SECTION IV

VOLUNTARY ALIENATION OF LAND

TITLE I—ABSOLUTE CONVEYANCE INTER VIVOS

Form

1386. Subject to § 1497 (conveyance by infant under a custom), and §§ 1387 and 1388, a conveyance *inter vivos* (including a lease) of the legal title to an interest in land can only be made by deed or (in the case of registered land) by deed or registered transfer; ^(a) and a conveyance binding in equity (other than a lease at will) can only be made by writing signed by the conveying party or his agent thereunto lawfully authorized by writing.^(b)

(a) Real Property Act, 1845, s. 3.

(b) Statute of Frauds (1677) ss. 1, 3.

Short leases

1387. A lease not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term amounts to two thirds at the least of the full improved value of the land demised, may be made by word of mouth.

Statute of Frauds (1677) s. 2.

ABSOLUTE CONVEYANCE INTER VIVOS 809

1388. A surrender of a copyhold or customary *Copyholds* tenement to the lord of the manor, with a view to its alienation, and any lawful grant or admittance by such lord in pursuance of custom, may be made by word of mouth in accordance with the custom of the manor.

Statute of Frauds (1677) s. 3.

[There is no statutory provision as to grants or admittances of or to copyholds. But the practice is for these transactions, as well as surrenders, to be effected by word of mouth, and then to be recorded in writing on the manorial rolls.]

1389. A conveyance on sale of a freehold interest *Compulsory registration* in unregistered land, situate within an area in which registration of title is compulsory on sale; does not pass the legal estate; unless and until the person in whose favour it is made is registered as proprietor.

Land Transfer Act, 1897, s. 20.

[Up to the present date, the only area in which registration is compulsory on sale is the administrative county of London.]

1390. A conveyance by non-registered deed of *Non-registered conveyance* an interest in registered land, whether or not situate within an area in which registration is compulsory on sale, will, if otherwise regular, convey the legal title.

Capital and Counties Bank v. Rhodes [1903] 1 Ch. 631.

[A vendor who agrees to sell a mortgage sub-term in registered land, even in a compulsory area, cannot be called upon by the pur-

chaser to procure himself to be registered under s. 16 (2) of the Land Transfer Act, 1897 (*Voss' and Saunders' Contract* [1911] 1 Ch. 42).]

Estoppel by deed

1391. A conveyance by deed works an 'estoppel,' i. e. it prevents any party to it,^(a) and any person subsequently claiming through such party,^(b) denying, in any proceedings on such deed,^(c) as against any person entitled to rely on such statement,^(d) the truth of any clear and explicit statement,^(e) contained in such conveyance, of material fact, with regard to his title. And if such statement was in fact not true at the time when it was made, but the person making it (?or any person claiming through him), subsequently acquires property the ownership of which would have justified such statement, such property passes by operation of law to the person or persons entitled to rely on such statement ('feeding the estoppel').^(f)

- (a) *Fairtitle v. Gilbert* (1787) 2 T. R., at p. 171, *per* Ashurst, J.
Doe v. Roberts (1819) 2 B. & Ald. 367.
Phillpotts v. Phillpotts (1850) 10 C. B. 85.

[It is a question of construction which of the parties to the deed are parties to any statement in it (*Stroughill v. Buck* (1850) 14 Q. B. 781).]

- (b) *Doe v. Skirrow* (1837) 7 A. & E. 157.
Doe v. Stone (1846) 3 C. B. 176.
Dalton v. Fitzgerald [1897] 2 Ch. 86.

[Apparently, the rule does not apply if the statement was erroneous in law only, not in fact (*Re Anderson* [1905] 2 Ch. 70).]

- (c) *Carpenter v. Buller* (1841) 8 M. & W. 209.
Carter v. Carter (1857) 3 K. & J. 617, at p. 645, *per* Wood, V. C.
Fraser v. Pendlebury (1861) 31 L. J. C. P. 1.

- (d) Generally speaking, only parties to the deed, and persons claiming through them ('privies in blood or estate'), can set up the doctrine of estoppel (*Trinidad Asphalt Co. v. Coryat* [1896] A. C. 587). But there appears to be little authority on the point. As to who are 'privies in blood,' see *Weeks v. Birch* (1894) 69 L. T. 759.
- (e) *Right v. Bucknell* (1831) 2 B. & Ad. 278.
Heath v. Crealock (1874) L. R. 10 Ch. App. 22.
General Finance Co. v. Liberator Socy. (1878) 10 Ch. D. 15.
Onward Buildg. Socy. v. Smithson [1893] 1 Ch. 1.

[e. g. the mere grant of an estate, even if accompanied by covenants for title, does not amount to such a statement. And the grantor or those claiming under him will not be estopped from denying that he had a title to the legal estate at the date of the grant (*General Finance Co. v. Liberator Socy.*, *ubi sup.*).]

- (f) *Rawlins' Case* (1587) 4 Rep. 52 a.
Style v. Hearing (1605) Cro. Jac. 73.
Edwards v. Omellballum (1639) March, 64.
Doe v. Oliver (1830) 5 Man. & Ry. 202.

[The doctrine of estoppel applies to incorporeal hereditaments (*Poulton v. Moore* [1915] 1 K. B. 400).]

1392. A conveyance by deed takes effect from the delivery thereof. *Delivery of deed*

- Willis v. Jermin* (1589) Cro. Eliz. 167.
Styles v. Wardle (1825) 4 B. & C., at p. 911, *per* Bayley, J.
Tupper v. Foulkes (1861) 9 C. B. N. S. 797.

[As to what constitutes 'delivery,' see *ante*, Bk. II, Pt. I, § 216. 'Anything to show that he treated the deed as his deed is enough' (*Tupper v. Foulkes*, *ubi sup.*, at p. 809, *per* Williams, J.).]

1393. No one can be compelled to accept a conveyance by deed.^(a) *Disclaimer* But a conveyance of land by deed at once vests the land in the grantee; even if he is unaware of its existence. The grantee may, however, on becoming aware of the conveyance, dis-

claim; in which case the land will be deemed never to have vested in him.^(b)

- (a) *Townson v. Tickell* (1819) 3 B. & Ald. 31.
- (b) *Butler's and Baker's Case* (1591) 3 Rep., at 26 b. *per Curiam*.
Smyth v. Wheeler (1671) 2 Keb. 772.
Sir Simon Leech's Case (1692) Carth. 250.
Doe v. Knight (1826) 5 B. & C. 471.
Mallott v. Wilson [1903] 2 Ch. 494.

[Even the fact that the conveying party retains the conveyance in his own hands will not prevent the operation of the rule; if it is clear that he intended the conveyance to be effectual (*Doe v. Knight, ubi sup.*, at p. 692, *per Curiam*). And even a formal disclaimer only revests the interest of the disclaiming party, not any trusts limited out of it (*Mallott v. Wilson, ubi sup.*). It was said in *Butler's and Baker's Case, ubi sup.*, that a freehold could not be divested by a mere oral disclaimer *in pais*, i. e. without deed or record. But see the contrary decided in the modern case of *Re Birchall* (1889) 40 Ch. D. 436, which was, however, a case of devise.]

*Gift to
stranger*

1394. An immediate interest may be taken under a deed executed after 1st October, 1845, by a person not named as a party thereto.

Real Property Act, 1845, s. 5.

[Before the passing of the Real Property Act, 1845, a person not a party thereto could take an interest under a 'deed poll,' i. e. a deed not professed to be made *inter partes* (2 Inst. 673). But a stranger could not take an immediate interest under an indenture purporting to be made *inter partes*.]

*Presumption
in favour of
grantee*

1395. A conveyance by deed is construed, so far as the words used will reasonably admit, in favour of the grantee and against the grantor.^(a) The same

rule applies to an exception by the grantor out of the property conveyed to the grantee.^(b)

(a) Co. Litt. 42, 183.

Willion v. Berkley (1562) 1 Plowd., at fo. 242 a, *per* Weston, J.

Re Stroud (1849) 8 C. B., at p. 529, *per* Wilde, C. J.

(b) *Bullen v. Denning* (1826) 5 B. & C. 842.

Savill Bros. v. Bethell [1902] 2 Ch. 523.

[There is a well-known exception in the case of a grant by the Crown (*Willion v. Berkley*, *ubi sup.*). And sometimes the statement of the rule is qualified by limiting it to conveyances for valuable consideration (*Neill v. D. of Devonshire* (1882) L. R. 8 App. Ca., at p. 149, *per* Lord Selborne, C.).]

1396. A conveyance of the legal estate in land is effectual, without valuable consideration, to pass also the equitable interest, even to a stranger, in the absence of expression to the contrary. *Voluntary conveyances*

Villers v. Beaumont (1682) 1 Vern. 100, *per* Lord Nottingham, C.

Lloyd v. Spillet (1740) 2 Atk. 148.

Young v. Peachy (1741) *ibid.*, at p. 256, *per* Lord Hardwicke, C.

Fowkes v. Pascoe (1875) L. R. 10 Ch. App., at p. 348, *per* James, L. J.

[The opinion expressed by Lewin (*Trusts*, 12th ed., p. 164) and other text-book writers, to the effect that, in the absence of express words, there is a presumption of a resulting trust for the grantor, is not borne out by the decisions quoted in support of it; though there are earlier decisions (e. g. *Elliot v. Elliot* (1677) 2 Cha. Ca. 231; *D. of Norfolk v. Browne* (1697) Pre. Cha. 80) which appear to support that view. Of course, absence of consideration may be evidence of fraud; but fraud is never presumed. Equally of course, a voluntary conveyance may be invalid because it tends to defeat or delay creditors (*post*, Sect. xv). In order to prevent a resulting use of the legal estate in a purely voluntary conveyance to a stranger, the use must be expressed to be for the benefit of the grantee. (Sanders, *Uses*, p. 97).]

Not revoc-
able

1397. Any conveyance of land made with intent to defraud purchasers, other than a conveyance for valuable consideration to a *bonâ fide* acquirer,^(a) and any conveyance reserving power to the conveying party to revoke, determine, or alter such conveyance at his will or pleasure,^(b) will be void against subsequent purchasers of such land.^(c) But no voluntary conveyance, in fact made *bonâ fide* and without fraudulent intent, will be deemed fraudulent and void under this §, merely by reason of a subsequent purchase for value, or conveyance thereunder.^(d)

(a) 27 Eliz. (1585) c. 4, s. 4. (The exception includes a mortgagee (s. 6)).

(b) *Ibid.*, s. 5.

(c) *Ibid.*, s. 2.

(d) Voluntary Conveyances Act, 1893, s. 2.

[The last mentioned statute was rendered necessary by the strained construction put upon the older Act, to the effect that a subsequent conveyance for value, even to a purchaser who knew of a former voluntary conveyance, defeated the voluntary conveyance (*Doe v. Manning* (1807) 9 East, 59). The Act of 1893 is retrospective; but with a saving for conveyances for value before its passing (s. 3).]

TITLE II—CONVEYANCE BY WAY OF MORTGAGE

1398. Any conveyance of land having for its object to secure the payment of money is a mortgage, whatever it may be called.^(a) A mortgage cannot be made irredeemable.^(b)

Mortgage cannot be irredeemable

- (a) *Newcomb v. Bonham* (1681) 1 Vern. 7 (sale with option of repurchase).
Fawcett v. Bowers (1693) 1 Ed. 287 (grant of rent).
James v. Oades (1700) 2 Vern. 402 (do.).
Re Alison (1879) 11 Ch. D. 284 (trust for sale).
Salt v. M. of Northampton [1892] A. C. 1 (effecting life insurance).
Santley v. Wilde [1899] 2 Ch., at p. 474, *per* Lindley, M. R.
- (b) *Newcomb v. Bonham*, *ubi sup.*
Howard v. Harris (1683) 1 Vern. 190.
Fairclough v. Swan Brewery Co. [1912] A. C. 565.

[But a mortgage can become irredeemable by the mortgagor, if he makes a subsequent mortgage without disclosing it (4 W. & M. (1692) c. 16, s. 3).]

1399. A mortgage of the legal estate may be made by deed, surrender (of copyholds) or registered disposition; ^(a) a mortgage conveying an equitable interest ('equitable mortgage') may be effected by deed, ^(b) by written memorandum or charge, ^(c) or by deposit of title deeds (including land certificate). ^(d) A statutory charge on registered land may also be effected by entry on the register of charges. ^(e)

Form of mortgage

- (a) A legal mortgage is effected in the same way (*mutatis mutandis*) as an absolute conveyance (*ante*, Tit. I, §§ 1386, 1388, 1389).
- (b) This method is adopted when the mortgagor has not in fact the

legal estate, but it is desired to secure for the mortgagee the statutory powers conferred by the Conveyancing Act, 1881 (*post*, §§ 1405-11).

- (c) The advantage of this method is that the stamp duty is lower than on a mortgage by deed. But the mortgagee cannot exercise statutory powers.
- (d) *James v. James* (1873) L. R. 16 Eq. 153. (In this case Equity allows the deposit to override the plain words of the Statute of Frauds).
Land Transfer Act, 1897, s. 8 (6).
- (e) Land Transfer Act, 1875, s. 22. A peculiar advantage of this form is, that it confers statutory powers upon the mortgagee (Land Transfer Act, 1897, s. 9 (2)). But, presumably, it does not pass the legal estate.

Priorities

1400. Generally speaking, mortgages rank in priority in order of date; subject to the rule that the *bonâ fide* acquirer of the legal estate for value without notice of an earlier equitable mortgage takes priority of such mortgage.^(a) But, subject to § 1419, *post*, the holder of a legal mortgage who makes further advances to the mortgagor without notice of any intervening mortgage, is entitled to be repaid such further advances in priority to such intervening mortgage;^(b) and the holder of an equitable mortgage may, by taking a transfer of a legal mortgage, become entitled to add the amount of his claim on the equitable mortgage to the sum due on the legal mortgage, in priority to all prior equitable mortgages of which he was *bonâ fide* ignorant when he gave the value for his equitable mortgage ('Tacking').^(c)

(a) *Rooper v. Harrison* (1855) 2 K. & J. 86, and see *ante*, Sect. I, Tit. XI, § 1313.

CONVEYANCE BY WAY OF MORTGAGE 817

- (b) *Bedford v. Backhouse* (1730) 2 Eq. Ca. Ab. 615.
Hopkinson v. Rolt (1861) 9 H. L. C. 514.
West v. Williams [1899] 1 Ch. 132.
Taylor v. L. & Coy. Banking Co. [1901] 2 Ch., at p. 256, *per*
 Stirling, L. J.

[*West v. Williams* shows, however, that this claim cannot be supported in the face of notice of the mesne mortgage; even though the legal mortgagee had actually bound himself to make the further advances.]

- (c) *March v. Lee* (1670) 1 Cha. Ca. 162.
Blake v. Hungerford (1701) Pre. Cha. 158.

[It would appear from *Rooper v. Harrison*, *ubi sup.*, that the principle of 'tacking' can only be used as a defence. If the person setting it up sells the property by virtue of a power in the legal mortgage, he cannot retain the surplus over the amount due on the legal mortgage, to satisfy his claims under the equitable mortgage; at any rate if the legal mortgage contains a trust or destination of the surplus moneys for the next incumbrancer. The later case of *Selby v. Pomfret* (1861) 3 De G. F. & J. 595, though spoken of in the report as one of 'tacking,' was clearly 'consolidation' (*post*, § 1417).]

1401. A mortgagee may, subject to the rights of *Dealings with mortgage* the mortgagor and other persons interested in the equity of redemption, transfer his mortgage debt and interest in the mortgaged property, either absolutely or by way of sub-mortgage; and his transferee or sub-mortgagee will, subject to the terms of the mortgage, and those of the transfer or sub-mortgage, enjoy all the rights of the original mortgagee.^(a) Probably, the mortgagee cannot transfer part of the mortgage debt in such a way as to divide his remedies and powers between himself and his transferee.^(b) The

interest of the mortgagee, even when the mortgaged property is realty, is personal estate.^(c)

- (a) *Re Lord Southampton's Estate* (1880) 16 Ch. D. 178.
Turner v. Smith [1901] 1 Ch. 213.
 Land Transfer Act, 1875, s. 40.

[Notice to the mortgagor of the transfer is not essential to render the transaction effectual between the mortgagee and the transferee; but, as the above cases show, it is necessary to prevent the transferee being prejudiced by subsequent dealings between the original mortgagee and the mortgagor.]

- (b) *Flower v. Pritchard* (1909) 53 Sol. Jo. 178.
Forster v. Baker [1910] 2 K. B. 636.
- (c) *Casborne v. Scarfe* (1737) 1 Atk., at p. 605, *per* Lord Hardwicke, C. (Consequently, a devise of 'lands' generally, will not pass the beneficial interest in land vested in the testator by way of mortgage, or the mortgage debt (*Winn v. Littleton* (1689) 1 Vern. 3). But if a mortgagee, not being a trustee (Conveyancing Act, 1911, s. 9 (1)), forecloses, or acquires a title by possession under the Real Property Limitation Acts (*post*, Tit. IV) his interest acquires the character of the estate of the mortgagor (*Re Loveridge* [1904] 1 Ch. 518).)

Non-statutory powers of mortgagee

1402. Every legal mortgagee (including the registered proprietor of a registered charge) has, after the mortgage money has become due, and independently of any express authority contained in the mortgage, the following remedies for the enforcement of his security, viz.:

- (i) the right to take possession of the mortgaged property;

Land Transfer Act, 1875, s. 25.
Doe v. Lightfoot (1841) 8 M. & W. 553.
Bovill v. Endle [1896] 1 Ch. 648.

[Unless there is any stipulation to the contrary in the mortgage, the mortgagee may exercise this right at any time after the making

CONVEYANCE BY WAY OF MORTGAGE 819

of the mortgage (*Doe v. Lightfoot*, *ubi sup.*); but one drawback of such a step is, that it entitles the mortgagor to pay off the mortgage at once without notice (*Bovill v. Endle*, *ubi sup.*). Another drawback is, that the mortgagee in possession is bound to account, not only to the mortgagor or his representatives (*Wragg v. Denham* (1836) 2 Y. & Co. (Exch.) 117; *Taylor v. Mostyn* (1886) 33 Ch. D. 226), but to subsequent incumbrancers, and even after he has assigned the mortgage (*Venables v. Foyle* (1660) 1 Cha. Ca. 2), for all the profits which he has received, or, without wilful default, might have received. Moreover, it is doubtful whether, having once taken possession, he can relinquish it (*Re Prytherch* (1889) 42 Ch. D. 600; *per North, J.*.)]

- (ii) the right (unless excluded by the terms of the mortgage) by action or other proceedings to recover from the mortgagor personally the amount due on the mortgage;

Land Transfer Act, 1875, s. 23.

Meynell v. Howard (1696) Pre. Cha. 61.

King v. King (1735) 3 P. Wms. 358.

[But, if there is no covenant, express or implied, for payment of the money, the debt will be only simple contract. And the mortgagee cannot sue the assignee of the equity of redemption personally to recover the mortgage money, or prove in his bankruptcy, even if he has paid interest (*Ancaster v. Mayer* (1785) 1 Bro. C. C., at p. 464, *per* Lord Thurlow, C.; *Re Errington* [1894] 1 Q. B. 11).]

- (iii) the right to obtain from the Court an absolute order of foreclosure, excluding the mortgagor from all further right to redeem the mortgage.

Land Transfer Act, 1875, s. 26.

[Such an order will be made as of course if any money remains due; but an order *nisi* will first be made, directing accounts to be taken by the Master, and giving the mortgagor, at least in the case of a formal mortgage, six months from the date of the Master's certificate, in which to redeem. A personal order for payment

within a much shorter time (*e. g.* a month) of the money due may be made, however, if asked for by the writ (*Farrer v. Lacy* (1883) 25 Ch. D. 636). An equitable mortgagee cannot take possession (*Garfitt v. Allen* (1888) 37 Ch. D., at p. 50, *per* North, J.); but he has the other rights described in the §.]

*Re-opening
foreclosure*

1403. A mortgagee who, after obtaining a foreclosure, sues the mortgagor on his personal liability, 're-opens' the foreclosure, i. e. entitles the mortgagor to redeem; ^(a) and, if the mortgagee has parted with the property after foreclosure, he cannot sue the mortgagor personally to recover the mortgage money. ^(b)

(a) *Dashwood v. Blythway* (1729) 1 Eq. Ca. Ab. 317.

Kinnaird v. Trollope (1888) 39 Ch. D. 637.

(b) *Perry v. Barker* (1806) 13 Ves. 198.

Annual rests

1404. Generally speaking, a mortgagee in possession, though accountable for the surplus rents and profits after discharging interest, will not be compelled to deduct them, as they accrue, from the principal, so as to reduce the debt by instalments. ^(a) But if there was no interest in arrear when he entered, or if the whole of the principal and interest has been covered by the receipts, the mortgagee in possession will be compelled to account with annual rests, and to pay compound interest at four *per cent.* on the amount found due from him. ^(b)

(a) *Wrigley v. Gill* [1905] 1 Ch., at p. 253, *per* Warrington, J.

Ainsworth v. Wilding, ibid., at p. 440, *per* Joyce, J.

(b) *Ainsworth v. Lord* (1887) 36 Ch. D. 545.

[Consequently, if there is a provision in the mortgage for capitalization of interest in arrear, it cannot be enforced, so long as the amount of rents and profits received by the mortgagee exceeds the amount of interest due (*Wrigley v. Gill* [1906] 1 Ch. 165).]

1405. Subject to § 1410, where a mortgagee is in possession of land under a mortgage by deed or registered charge made after 31st December, 1881,^(a) or where he has appointed a receiver, who still acts, under the statutory power described in § 1406 (ii), *post*,^(b) he may, subject to the terms of the mortgage deed: ^(c) —

Leases and cutting of timber by mortgagee

- (a) Conveyancing Act, 1831, s. 2 (6), s. 18 (13) (16), s. 19 (1) (4).
Land Transfer Act, 1897, s. 9 (2).
- (b) Conveyancing Act, 1911, s. 3 (11).
- (c) Conveyancing Act, 1881, s. 18 (13), s. 19 (3).

- (i) grant agricultural or occupation leases of any part of the land for any terms not exceeding twenty-one, or building leases for any terms not exceeding ninety-nine years, to take effect in possession not later than twelve months after their dates, at the best rent that can reasonably be obtained without fine, which leases will be binding against all prior incumbrancers and the mortgagor ;

Ibid., s. 18 (2)–(6).

[Various provisions for securing the formality and effectiveness of the leases are contained in the section (7)–(12). And a mortgagee in possession, or who has appointed a still acting receiver, may accept surrenders of existing leases with a view to granting

leases authorised by the Act, or the mortgage deed, or an agreement pursuant to the Act (Conveyancing Act, 1911, s. 3).]

- (ii) cut and sell timber and other trees ripe for cutting, and not planted or left for shelter or ornament, or contract for any such cutting and sale, to be completed within twelve months from the making of the contract.

Conveyancing Act, 1881, s. 19 (1) (iv).

[Apart from the Act, a mortgagee can only cut timber if he shows the security to be defective (*Withrington v. Banks* (1725) Sel. Ca. Cha. (Macnaghten) 92).]

Other statutory powers of mortgagee

1406. Subject to §§ 1408, 1410, *post*, a mortgagee by deed executed after 31st December, 1881, or by registered charge, whether in possession of the mortgaged property or not, but only when the mortgage money has become due, may, subject to the terms of the mortgage:

- (i) sell, or concur in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, in any reasonable manner;

Ibid., s. 19 (1) (i), (2).

Land Transfer Act, 1897, s. 9 (2).

[The mortgagee holds any surplus produced by a sale after satisfying his claim, for the person 'entitled to the mortgaged property' (Conveyancing Act, 1881, s. 21 (3)), which, presumably, means the person who was entitled to it (subject to the mortgage) before the sale. Of course, the mortgagee cannot compel prior incumbrancers to join in the sale; but a useful section (s. 5) of the Conveyancing Act, 1881, allows the Court to authorize a sum of money

CONVEYANCE BY WAY OF MORTGAGE 823

to be paid into Court to meet prior incumbrances, and to declare the land free from incumbrance.]

- (ii) appoint by writing from time to time a receiver of the income of the mortgaged property or any part thereof, who will, unless the mortgage otherwise provides, be deemed the agent of the mortgagor, and who will have power to demand and recover all the income of such property by action, distress, or otherwise, in the name of the mortgagor or of the mortgagee.

Conveyancing Act, 1881, s. 19 (1) (iii), 24 (1)–(5).
Land Transfer Act, 1897, s. 9 (2).

[The moneys coming to the receiver are to be employed (1) in discharging outgoings (2) in keeping down prior charges (3) in paying the receiver's commission, premiums on insurance, and repairs authorized by the mortgagee in writing (4) in paying the mortgagee's interest. The balance is to be paid to the person entitled to the income subject to the receiver (Conveyancing Act, 1881, s. 24 (6)–(8)).]

1407. Where the mortgage deed was executed after 31st December, 1911, a mortgagee, exercising his power of sale under § 1406 may — *Special terms of sale*

- (i) impose on any part of the land sold, or any part remaining unsold, any restriction or reservation, with respect to building on, or other user of, such land, or with respect to mines and minerals, or for the purpose of the more beneficial working

thereof, or with respect to any other thing ;

(ii) sell the mortgaged property, or any part thereof, or any mines and minerals apart from the surface : —

- (a) with or without a grant or reservation of easements, rights, and privileges in relation to the property remaining in mortgage or the part sold ;
- (b) with or without an exception or reservation of all or any of the mines or minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, or other powers, easements, rights, and privileges for mining purposes, in relation to the property remaining unsold, or any property sold ;
- (c) with or without covenants by the purchaser to expend money on the land sold.

Conveyancing Act, 1911, s. 4.

*Restrictions
on powers*

1408. The mortgagee must not exercise the powers of sale or appointment of a receiver described in § 1406, until there has occurred : —

- (i) three months' default in payment of the mortgage money after written notice to pay off, *or*
- (ii) failure to pay any part of the interest for two months after it became due, *or*
- (iii) some breach of a provision made on behalf of the mortgagor or a person concurring in the mortgage, other than the covenant for payment of mortgage money and interest.^(a)

But no purchaser, or person paying money to a receiver under the above powers, is bound to enquire whether a case for a sale or the appointment of a receiver has arisen.^(b)

(a) Conveyancing Act, 1881, ss. 20, 24 (1).

(b) *Ibid.*, ss. 21 (2), 24 (4); Conveyancing Act, 1911, s. 5.

[*Semble*, if the mortgage-money is not due, the power of sale or appointment of a receiver does not exist under the Act; and a purchaser or tenant will not be protected under the above clause. (But see Conveyancing Act, 1911, s. 5 (1).) A mortgagee who has obtained a foreclosure order *nisi* cannot properly exercise his power of sale; but a *bonâ fide* purchaser from him will be protected (*Stevens v. Theatres Ltd.* [1903] 1 Ch. 857). Subject to these reservations, the power of sale, except in the case of a registered charge (Land Transfer Act, 1897, s. 9 (2)), can be exercised by any one entitled to receive and give a discharge for the mortgage money (Conveyancing Act, 1881, s. 21 (4)); and such person can obtain from any one, other than a prior incumbrancer, any deed or document of title relating to the property, to which a purchaser under the power of sale would be entitled (Conveyancing Act, 1881, s. 21 (7)).]

1409. Subject to § 1410, a mortgagee by deed executed since 31st December, 1881, or by a reg-

Power to insure

istered charge, whether in possession or not, and whether the mortgage money has become due or not, may (subject to the terms of the mortgage) unless an adequate insurance is maintained by the mortgagor, insure any building, or any effects or property of an insurable nature, being part of the mortgaged property, against loss or damage by fire; and the premiums paid for any such insurance will be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money.

Conveyancing Act, 1881, ss. 19 (i) (ii), 23.

Land Transfer Act, 1897, s. 9 (2).

[There are certain regulations as to the amount for which, and the circumstances in which, the mortgagee may insure. The mortgagee may require all money received on an insurance effected under the deed or the Act to be applied in making good the damage, or (subject to legal or contractual obligations to the contrary) towards discharge of the amount due under the mortgage (Conveyancing Act, 1881, ss. 19 (i) (ii), 23).]

*Mortgagee's
powers may
be varied*

1410. The mortgagee's statutory powers of sale, leasing, insurance, and appointment of a receiver, only apply in so far as a contrary intention is not expressed in the mortgage deed, or, in the case of leasing, otherwise in writing.

Conveyancing Act, 1881, ss. 18 (13), 19 (3).

Land Transfer Act, 1897, s. 9.

Conveyancing Act, 1911, s. 4.

[It seems a little doubtful whether the special powers conferred by this last enactment (§ 1407, *ante*) can be restricted by the mortgage deed, unless the power of sale itself is excluded.]

CONVEYANCE BY WAY OF MORTGAGE 827

1411. In any action for foreclosure or redemption, *Sale instead of foreclosure or redemption* or for raising and payment in any manner of mortgage money, the Court may, on the application of any person interested either in the mortgage money or the right of redemption, direct a sale of the mortgaged property on such terms as the Court thinks fit, without previously determining the priorities of incumbrancers.^(a) But such a direction may be revoked, and an order of foreclosure made, if the Court thinks fit.^(b)

(a) Conveyancing Act, 1881, s. 25.

[This section is of great use to informal mortgagees. Before the Act, it was doubtful whether a mortgagee by deposit of title deeds was entitled to a sale; unless there was a written agreement by the mortgagor to execute a formal mortgage (*Oldham v. Stringer* (1885) 51 L. T. 895). Now he can bring an action for foreclosure, and ask for a sale.]

(b) *Lloyds Bank v. Colston* (1912) 106 L. T. 420. (On the ground that the property was worth less than the amount due to the mortgagee, and that a sale would be an useless expense.)

1412. A mortgagor may, subject to the rights of *Equity of redemption* the mortgagee or mortgagees, sell, mortgage, lease, surrender, or otherwise deal with his equity of redemption in the land, in the same manner as any other equitable interest; and such equity of redemption will be deemed to be real or personal estate in accordance with the character of the property mortgaged.

Casborne v. Scarfe (1737) 1 Atk., at p. 605, *per* Lord Hardwicke, C.
West v. Williams [1899] 1 Ch., at p. 143, *per* Lindley, M. R.

[The purchaser of an equity of redemption is, in general, bound in equity to indemnify the mortgagor against liability for payment of the mortgage debt (*Waring v. Ward* (1802) 7 Ves., at p. 337, *per* Lord Eldon, C.). But this rule does not apply where the circumstances of the transfer rebut the presumption that such was the intention of the parties (*Mills v. United Counties Bank* [1912] 1 Ch. 231).]

*Right to
redeem*

1413. Subject to §§ 1411 and 1417, any person interested in any property subject to a mortgage may, at any time after the mortgage money has become due,^(a) and at any time before the mortgagee has actually parted with the property to a person entitled to hold it against equitable claims,^(b) redeem the property, on payment to the mortgagee of the amount due for principal, interest, and costs.^(c) And any person entitled to redeem mortgaged property may have an order for sale instead of redemption, in any action brought by him for sale or redemption (of the mortgage).^(d)

(a) *Brown v. Cole* (1845) 14 Sim. 427.

(b) *Ante*, Sect. I, Tit. XI, § 1313.

(c) *Christian v. Field* (1842) 2 Ha. 177 (creditors in administration suit).
Smith v. Green (1844) 1 Coll. C. C. 555 (subsequent incumbrancer).
Batchelor v. Middleton (1847) 6 Ha. 75 (legatees having a charge on the equity).

Pearce v. Morris (1869) 39 Ch. D., at p. 229, *per* Lord Hatherley, C.

Anderson v. Pignet (1872) L. R. 8 Ch. App., at p. 190, *per* Mellish, L. J. (dowress).

Beckett v. Buckley (1874) L. R. 17 Eq. 435 (judgment creditor of mortgagor).

Bankruptcy Act, 1883, Sched. I (12), II, (12) (trustee in bankruptcy of mortgagor).

Tarn v. Turner (1888) 39 Ch. D. 456 (lessee of equity).

(d) Conveyancing Act, 1881, s. 25 (1).

[Owing to expressions of Wright, J., in *Re Vautin* [1899] 2 Q. B. 549, there seems to be some little doubt whether the trustee in bankruptcy of the mortgagor is entitled to redeem; unless the mortgagee claims to vote or receive a dividend in the bankruptcy. But see *Re Button* [1905] 1 K. B. 602. The person seeking to redeem must, in general, give the mortgagee six months' notice, or pay six months' interest. But if the mortgagee has taken any steps to enforce payment, the mortgagor may pay off at once (*Bovill v. Endle* [1896] 1 Ch. 648; *Edmondson v. Copland* [1911] 2 Ch. 301); and, in any case, the mortgagor can pay off on the day fixed by the mortgage for repayment, without notice. Where no day is fixed for payment, the mortgagor must give reasonable notice (*Fitzgerald's Trustees v. Mellersh* [1892] 1 Ch. 385). It is the duty of the mortgagee on redemption to hand over the title deeds and make a reconveyance to the redeeming party; but if the latter appears to have only a limited interest in the equity of redemption, the reconveyance should be so worded as to reserve the rights of other persons interested (*Pearce v. Morris, ubi sup.*). A mortgagee who unreasonably refuses to reconvey on tender, is liable to be ordered to pay the costs of a redemption action (*Smith v. Green, ubi sup.*). It has been held (*Ramsbottom v. Wallis* (1835) 5 L. J. Ch. (N. S.) 92) that a subsequent mortgagee whose right to enforce his mortgage is not yet exercisable, cannot redeem a prior mortgagee; although the prior mortgage is redeemable by the mortgagor. But the terms of the second mortgage were peculiar in this case.]

1414. A reconveyance to or for the benefit of the mortgagor on redemption operates for the benefit of the incumbrancer next in succession, if any; and the mortgage debt is extinguished.^(a) (See *ante*, Sect. I, Tit. I, § 1041 n.) But where the mortgage is redeemed by a third party, and the effect of a merger of the debt would be to make a gift to the next incumbrancer or person interested, at the expense of the party redeeming, there is a presumption that the party redeeming the mortgage intended to

*Effect of
reconvey-
ance*

keep alive the mortgage, and it will be treated as still subsisting for his benefit.^(b)

- (a) *Toulmin v. Steere* (1817) 3 Mer. 210.
Otter v. Lord Vaux (1856) 2 K. & J. 650.

[*Toulmin v. Steere* has been severely criticized; and it went much further than is necessary to support the proposition for which it is quoted. But for that proposition it is good authority.]

- (b) *Burrell v. E. of Egremont* (1844) 7 Beav. 205.
Thorne v. Cann [1895] A. C. 11.
Liquidation Estates Co. v. Willoughby [1898] A. C. 321.
Whiteley v. Delaney [1914] A. C. 132.

‘Clogging
the equity’

1415. Any stipulation in a mortgage, or forming part of a mortgage transaction, will be unenforceable against the mortgagor, or the person seeking to redeem the mortgage, in so far as it contemplates any of the following objects, viz. : —

[Whether or not the stipulation is part of the mortgage transaction, is a question of fact in each case. Generally speaking, if it is not, it will be enforceable (*Reeve v. Lisle* [1902] A. C. 461; *De Beers v. British South Africa Co.* [1912] A. C. 52).]

- (i) the postponement for an unreasonable period of the exercise of the right of redemption;

- Talbot v. Braddill* (1683) 1 Vern. 394.
Morgan v. Jeffreys [1910] 1 Ch. 620.

[There is no objection to a postponement for a reasonable period (*Biggs v. Hoddinott* [1898] 2 Ch. 307); especially if the right to postpone is mutual (*Williams v. Morgan* [1906] 1 Ch. 804).]

- (ii) the imposition of a higher rate of interest as a penalty for unpunctual payment of a lower;

Holles v. Wyse (1693) 2 Vern. 289, overruling *M. of Hallifax v. Higgs* (1689) *ibid.* 134.

[But it is not a penalty to stipulate for interest at one rate, reducible to a lower on punctual payment (*Strode v. Parker* (1694) *ibid.* 316), or that, on failure to pay an instalment of capital, the whole shall become due (*Wallingford v. Mutual Society* (1880) L. R. 5 App. Ca., at p. 696, *per* Lord Selborne, C.), or to arrange for interest in arrear to be added to capital (*Wrigley v. Gill* [1906] 1 Ch. 165).]

- (iii) the giving to the mortgagee a right or option to purchase the equity of redemption;

Bowen v. Edwards (1660) 1 Cha. Rep. 117.

Willett v. Winnell (1687) 1 Vern. 488.

Jarrah Co. v. Samuel [1904] A. C. 323.

[It has been questioned whether a mortgagee could enforce, during the continuance of the mortgage, a stipulation giving him a right of pre-emption, in the event of the mortgagor selling the property (*Orby v. Trigg* (1722) 9 Mod. 2).]

- (iv) the retention by the mortgagee of any collateral advantage, or any right or claim, against the mortgaged property^(a) or the mortgagor,^(b) or, *semble*, any other person,^(c) after the redemption of the mortgage;

(a) *Noakes v. Rice* [1902] A. C. 24, substantially overruling *Santley v. Wilde* [1899] 2 Ch. 474.

(b) *Bradley v. Carritt* [1903] A. C. 253.

(c) *Ibid.*, at p. 261.

[There is, however, no objection to a stipulation for a collateral advantage during the continuance of the security. It is merely a part of the interest (*Biggs v. Hoddinott* [1898] 2 Ch. 307). And it has been suggested, but not decided, that a stipulation in a floating charge, given by a commercial company, for the continuance of a collateral advantage after redemption, would not necessarily be bad (*De Beers v. B. S. A. Co.* [1912] A. C. 52; *Kreglinger v. New Patagonia Co.* [1914] A. C. 25).]

(v) the imposition of any penalty on or difficulty
in the exercise of the right of redemption.

Davies v. Chamberlain (1909) XXVI T. L. R. 138 (where, however, the stipulation was held not to be part of the mortgage transaction).
Fairclough v. Swan Brewery Co. [1912] A. C. 565.

And the person entitled to redeem may do so regardless of any such stipulation.

[At one time, it was very common for a mortgagor in actual occupation of the mortgaged property to attorn tenant to the mortgagee in the mortgage deed, at a rent equivalent to the amount of the annual interest; the chief object being to give the mortgagee a right of distress on non-payment of the interest. But this result can clearly not be achieved without registration under the Bills of Sale Acts (*post*, Sect. X, Tit. II, §§ 1573–1579); and the attornment clause, though it has certain other advantages, is now rarely found.]

No 'consolidation' unless reserved

1416. Unless the operation of section 17 of the Conveyancing Act, 1881, is expressly excluded by the mortgage deeds or one of them, a mortgagor can redeem any mortgage made since 1881, without redeeming any other mortgage held by the mortgagee on any property other than that comprised in the mortgage sought to be redeemed.

Conveyancing Act, 1881, s. 17.
Griffith v. Pound (1890) 45 Ch. D. 553.
Re Salmon [1903] K. B. 147.

[By the terms of the section, the operation of the doctrine of Consolidation can only be excluded by a deed. There seems no reason to doubt that the operation of s. 17 of the Conveyancing Act, 1881, can be excluded by a registered charge under seal (Land Transfer Rules, 1903, R. 169).]

1417. When section 17 of the Conveyancing Act, 1881, does not apply, a mortgagee can refuse to allow redemption of any mortgage, after the day fixed for repayment of the money thereby secured has passed ;^(a) unless the person seeking to redeem will also redeem any other overdue ^(a) mortgage created by the same mortgagor,^(b) in the hands of the mortgagee, the equity of redemption whereof has, at any time since both mortgages came into the hands of the mortgagee, been vested, together with the equity of redemption of the mortgage sought to be redeemed, in the person seeking to redeem, or any person through whom he claims.^(c) This rule only applies where both the mortgages were originally created by the same person.^(d)

(a) *Cummins v. Fletcher* (1879) 14 Ch. D. 699.

[This is an essential condition of the equitable right to consolidate. If the mortgagor is relying on a legal right to redeem, there is no opportunity of imposing terms upon him.]

(b) *Sharp v. Rickards* [1909] 1 Ch. 109.

(c) *Pledge v. White* [1896] A. C., at p. 198, *per* Lord Davey.

(d) *Sharp v. Rickards*, *ubi sup.*

[The doctrine of Consolidation, which is now not much favoured by the Courts, began with the very simple case in which the same mortgagor mortgaged two different properties to the same mortgagee,

allowed the days for redemption of both to pass, and then sought to redeem one mortgage, leaving the mortgagee with, perhaps, an inadequate security for the other. In such a case, the Court of Chancery applied the maxim: 'he who seeks equity must do equity' (*Pope v. Onslow* (1692) 2 Vern. 286). The doctrine was then extended to cover the much more questionable case in which one of the two equities had been sold to a stranger who sought to redeem (*Ex parte Carter* (1773) 2 Amb. 733). Finally, it was extended to cover the case in which the same mortgagor had mortgaged to different mortgagees, by mortgages which ultimately came to the same hand (*Vint v. Padget* (1858) 2 De G. & J. 611; *Selby v. Pomfret* (1861) 3 De G. F. & J. 595). But here the doctrine stopped; Fry, J., in *Harter v. Colman* (1882) 19 Ch. D. 636, refusing to extend it to the case in which the mortgagor, having assigned his first equity of redemption to A, subsequently made another mortgage to the same mortgagee, who sought to consolidate against A. (See also *Jennings v. Jordan* (1881) L. R. 6 App. Ca. 698; *Hughes v. Britannia B. S.* [1906] 2 Ch. 607). The right of consolidation can be enforced actively by a foreclosure action (*Tribourg v. Pomfret* (1773) 2 Amb. 733 n.), and, *semble*, also by means of a sale of the property comprised in one of the mortgages (*Selby v. Pomfret* (1861) 3 De G. F. & J. 595).]

*Mortgagor's
power of
leasing*

1418. A mortgagor in possession of land, the mortgage having been made since 1881, and no receiver, who still acts, having been appointed by the mortgagee, has, subject to the terms of the mortgage deed, the same power of making leases and accepting surrenders as a mortgagee in possession (*ante*, § 1405) ^(a). Such leases will take effect out of the legal estate, and bind all incumbrancers.^(b)

(a) Conveyancing Act, 1881, s. 18 (1); 1911, s. 3.

(b) *Wilson v. Queen's Club* [1891] 3 Ch. 522.

[Consequently, even if the owner of the legal estate, not being in possession, joins in the lease, the lessee's rights, though binding him, will be derived from the mortgagor in possession, as being the better title (*John Brothers v. Holmes* [1900] 1 Ch. 188).]

1419. A person entitled to redeem a mortgage may, despite any stipulation to the contrary, require the mortgagee, if the latter has not been in possession, on the terms upon which he would be bound to re-convey, to assign the mortgage debt and transfer the mortgaged property to any third person, as the person entitled to redeem may direct.^(a) But a requisition to this effect by a prior incumbrancer will prevail over a requisition by a later; and the requisition of any incumbrancer over a requisition of the mortgagor.^(b) *May require transfer*

(a) Conveyancing Act, 1881, s. 15.

(b) Conveyancing Act, 1882, s. 12.

[This last provision appears to affect somewhat seriously the previously existing possibilities of 'tacking' (*ante*, § 1400). It applies to all mortgages, whenever made.]

1420. A person entitled to redeem a mortgage made since the year 1881, may, notwithstanding any stipulation to the contrary, at his own request and cost, and on payment of the mortgagee's costs and expenses occasioned thereby, inspect and make copies of or extracts from the documents relating to the mortgaged property, in the custody or power of the mortgagee. *Power to inspect title-deeds*

Conveyancing Act, 1881, s. 16.

1421. When two separate estates or interests have been mortgaged to A, and only one of them to B, B *Marshalling*

is entitled, as against the mortgagor and his representatives,^(a) a surety for the mortgagor,^(b) and the trustee in bankruptcy of the mortgagor,^(c) to compel A to resort first for payment to the estate which is not mortgaged to him (B).

- (a) *Lanoy v. D. of Athol* (1742) 2 Atk. 444, *per* Lord Hardwicke, C.
Aldrich v. Cooper (1803) 8 Ves., at p. 395, *per* Lord Eldon, C.
Tidd v. Lister (1852) 10 Ha. 157.
Gibson v. Seagrim (1855) 20 Beav. 741.
- (b) *South v. Bloxam* (1865) 2 H. & M. 457.
- (c) *Ex parte Hartley* (1835) 1 Deac. 288 (Court of Review).
Ex parte Stephenson (1847) 1 De Gex, 586 (do.).
Gibson v. Seagrim, ubi sup.

[Where there are rival claims to marshal, the mortgagee of the two or more properties must pay himself rateably out of each (*Gibson v. Seagrim, ubi sup.*; *Moxon v. Berkeley Bdg. Society* (1890) 59 L. J. Ch. 524). But the right of marshalling does not prevent a mortgagee realizing his securities in such manner and order as he thinks fit. (*Manks v. Whiteley* [1911] 2 Ch., at p. 466, *per* Parker, J.). Another instance of marshalling of mortgages occurs when two or more separate properties are mortgaged by the same mortgagor to secure a single debt. In such a case, even before the doctrine of the Real Estate Charges Acts is applied, the burden of the debt will, as between the different representatives of the mortgagor, be apportioned rateably on the different properties, in proportion to their respective values (*Re Athill* (1880) 16 Ch. D., at pp. 229, 224).]

TITLE III—CHARGES ON LAND

1422. Subject to restrictive rules of law affecting special cases, any owner of an interest in land may charge it with liability for payment of any sum or sums of money specific or unascertained. Such charge may be effected by writing, sealed or unsealed, or by testament *Power to charge*

Cupit v. Jackson (1824) 13 Price, 721.

White v. James (No. 2) (1858) 26 Beav. 191.

Horton v. Hall (1874) L. R. 17 Eq. 437.

1423. The person entitled to the benefit of such a charge may, subject to the terms of the instrument creating it, and to the interests of all prior incumbrancers, apply to the Court for the appointment of a receiver of the rents and profits of the land, and a sale or mortgage of the interest subject to the charge, with a view to the realization thereof.^(a) But he is not entitled to an order for foreclosure, or the other remedies of a mortgagee.^(b) *Rights of owner of charge*

(a) *Re Tucker* [1893] 2 Ch. 323.

Hambro v. Hambro [1894] 2 Ch. 564.

Nightingale v. Reynolds [1903] 2 Ch. 236.

(b) *Sampson v. Pattison* (1842) 1 Ha. 533.

Tennant v. Trenchard (1869) L. R. 4 Ch. App., at p. 542, *per* Lord Hatherley, C.

Re Owen [1894] 3 Ch. 220.

[The remedy is in the discretion of the Court, unless there is an express power of sale in the instrument of charge. But it may be granted in all cases in which any sum appears to be charged upon land or the income thereof; even though there are no express words to that effect in the charge, and even though the owner of the charge has legal remedies, e. g. by entry and distress (*Hambro v. Hambro, ubi sup.*). Where the charge is created by the testament of a person dying since 5th August, 1897, there is, of course, usually no need to resort to the jurisdiction of the Court; as the personal representatives may sell in the exercise of their general powers (Land Transfer Act, 1897, s. 2). And, even where the death is prior to 6th August, 1897, trustees of land devised charged with the payment of debts or *specific* sums of money, and executors (but not administrators), have power to sell or mortgage for payment of such charges (Law of Property Amendment Act, 1859, ss. 14-18).]

*Remedies to
enforce an-
nual charge*

1424. The owner of any annual charge on land or the income of land, created since 1881, and not being rent incident to a reversion, has, subject to the terms of the instrument creating the charge, the remedies for the recovery of such charge specified as belonging to a rent-charger in Sect. I, Tit. IX, § 1289, *ante*.^(a) And such powers, whether exercised under the statute or by virtue of any other instrument, are not void for perpetuity.^(b)

(a) Conveyancing Act, 1881, s. 44.

(b) Conveyancing Act, 1911, s. 6.

[The remedies conferred by the earlier Act are exerciseable in the case of charges created since 1881; whether under powers created before that date or since (Act of 1911, s. 6 (2)).]

*Redemption
of annual
charges*

1425. Any annual sum issuing in perpetuity out of land, and not being a rent reserved on a sale or

lease, or a rent made payable under a grant or licence for building purposes, may be redeemed by any person interested in the land, in the manner described in Sect. I, Tit. IX, § 1294, *ante*.

Conveyancing Act, 1881, s. 45.

1426. A vendor of land, any part of whose purchase money remains unpaid,^(a) a purchaser of land, who has paid any part of his purchase money but has not obtained a conveyance of the land,^(b) a trustee who has expended his own money on land in necessary repairs or improvements,^(c) and any person who has expended money on the improvement of land, at the request or with the encouragement of the owner thereof, in the reasonable expectation of obtaining an interest therein,^(d) and who has not expressly or by implication waived his lien,^(e) is entitled to a lien on such land to secure the payment or repayment of such money, with interest at 4 *per cent.*^(f) Such lien operates as an equitable charge on the land,^(g) but not on the title deeds;^(h) and the person entitled to the benefit of it has the remedies described in § 1423, *ante*.⁽ⁱ⁾ The benefit of such a lien is transferable.^(k) *Liens on land*

- (a) *Hood v. Hood* (1867) 3 Jur. N. S. 684.
Earl St. Germans v. Crystal Palace Ry. Co. (1871) L. R. 11 Eq. 568.
Lycett v. Stafford & Uttoxeter Ry. Co. (1872) L. R. 13 Eq. 261.
Harding v. Harding (1872) *ibid.* 493.
Ecclesiastical Commrs. v. Penny [1900] 2 Ch. 736.

E E 3

- (b) *Wythes v. Lee* (1855) 3 Drew. 396.
Rose v. Watson (1864) 10 H. L. C. 672.
Whitbread & Co. v. Watt [1902] 1 Ch. 835.

[The last case shows that the purchaser's right is not lost by the fact that he rescinds the contract under an agreement allowing him to do so.]

- (c) *Re Aldred's Estate* (1882) 21 Ch. D. 228.
 (d) *D. of Beaufort v. Patrick* (1853) 17 Beav. 60.
Unity Joint Stock Bank v. King (1858) 25 Beav. 72.
Laird v. Birkenhead Ry. Co. (1859) Johns., at p. 511, *per Wood*, V. C.
Middleton v. Magnay (1864) 2 H. & M. 233.
Plimmer v. Mayor of Wellington (1884) L. R. 9 App. Ca. 699.
 (e) *Mackreth v. Symmons* (1805) 15 Ves. 329.
Winter v. Lord Anson (1828) 3 Russ. 488.
Re Brentwood Brick Co. (1876) 4 Ch. D. 562.

[The usual way of relinquishing a lien by implication is by accepting some other security. But this fact is not conclusive.]

- (f) *Turner v. Marriott* (1867) L. R. 3 Eq. 744.
Kitton v. Hewitt [1904] W. N. 21.

[The costs of any necessary action in which he has been successful may also be added to the lien (*Kitton v. Hewitt, ubi sup.*).]

- (g) *Mackreth v. Symmons, ubi sup.*
Rice v. Rice (1854) 2 Drew. 73.
 (h) *Goode v. Burton* (1847) 1 Exch. 189 (? since the J. Act).
 (i) *Sedgwick v. Watford Ry. Co.* (1867) L. J. 36 Ch. 379.

[It is not quite clear whether the lienor is not entitled to a decree for foreclosure, if he prefers it to a decree for sale (*Unity Joint Stock Bank v. King* (1858) 25 Beav., at p. 81).]

- (k) *Unity Joint Stock Bank v. King, ubi sup.*

'Clogging
the equity'

1427. All the charges described in this Title are subject to the restriction specified in Title II, § 1415, *ante* ('clogging the equity').

De Beers v. British S. Africa Co. [1910] 1 Ch. 354.

[The House of Lords ([1912] A. C. 52) held in this case that there was no 'clog.' But the general doctrine was admitted; though there were some doubts expressed as to whether it applied to the case of a floating charge.]

1428. All the charges described in this Title are *Charges are personal property*; ^(a) but a debenture comprising a charge on land creates an interest in land within the meaning of section 4 of the Statute of Frauds. ^(b)

(a) There can be little doubt, on general principles, that this is the case with regard to ordinary charges. And it was held in *Re Pryce* (1877) 4 Ch. D. 685, that a debenture was a chose in action, and so, presumably, personal estate.

(b) *Driver v. Broad* [1893] 1 Q. B. 744.

[For debentures, see *post*, Sect. XIII, Tit. IV. Debenture stock operating as a general charge on the revenue or income of a going corporation is not within the second part of the above rule (*Re Pickard* [1894] 3 Ch. 704).]

TITLE IV—ADVERSE POSSESSION

*Twelve
years' title*

1429. Subject to §§ 1432 and 1436, a person who, or whose predecessors in title,^(a) has or have taken possession of land under the conditions specified in §§ 1328, 1329, *ante*, and has or have held it for a period of twelve years^(b) continuously,^(c) acquires the interest in such land of all persons whose title is deemed to be adverse to his (§§ 166, 167, 1329, *ante*); except in so far as he is an express trustee for any such person,^(d) and except in so far as any such person is, by reason of any disability, entitled to a longer period in which to substantiate his claim.^(e)

(a) *Asher v. Whitlock* (1865) L. R. 1 Q. B. 1. (And see § 1332, *ante*.)

(b) Real Property Limitation Act, 1874, s. 1. (Payment of the whole rent under a lease to the original lessor, after a severance of the reversion of which the lessee has no notice, will not bar the right of the assignee of part of the reversion under s. 9 (*Mitchell v. Mosley* (1913) 57 Sol. Jo. 340).)

[It will be observed that the words of the section merely bar the former owner, without conferring title on the adverse possessor. But the effect of s. 34 of the Real Property Limitation Act, 1833, is to extinguish the title of the former owner, and thus to confer title on the possessor, when the title of all rival claimants has been barred (*Atkinson's and Horsell's Contract* [1912] 2 Ch. 1).]

(c) *Trustees' & Exors' Co. v. Short* (1888) L. R. 13 App. Ca. 793 (P. C.).

(d) Real Property Limitation Act, 1833, s. 25.
Judicature Act, 1873, s. 25 (2).

[For the extent to which an express trustee may rely upon the Statutes of Limitation, see *ante*, Bk. I, Sect. V, § 164.]

(e) Under this head are included the owners of interests which were still *in futuro* when the adverse possession commenced. (See *post* § 1433, and *ante*, Bk. I, §§ 166 and 167.)

1430. Subject to §§ 1431-1433, no action can be brought, or distress or entry made, by any person (other than the Crown or the Duke of Cornwall) to recover any rent charge, but within twelve years after the last receipt of such rent, or written acknowledgment of the right to receive the same.^(a) At the end of such period, the title to the rent passes to the person who has been in adverse receipt of it,^(b) or, if it has not been paid at all, it becomes extinct.^(c) Not more than six years' arrears of rent (whether rent charge or rent service) may be recovered against the land.^(d) *Rent charges*

(a) Real Property Limitation Act, 1874, s. 1; 1833, s. 14.

[In spite of the definition clause in the Real Property Limitation Act, 1833, s. 1, it is clear that the word 'rent' in s. 1 of the Act of 1874, and the corresponding s. 2 of the Act of 1833, means a rent charge, not a rent service (*Shaw v. Crompton* [1910] 2 K. B. 370); for an action to recover a rent service is, in effect, an action to recover the land itself (*Grant v. Ellis* (1841) 9 M. & W. 113; approved in *Irish Land Commission v. Grant* (1884) L. R. 10 App. Ca., at p. 26, *per* Lord Selborne, C.).]

(b) Real Property Limitation Act, 1833, s. 34.

[See, as to this effect, § 1429, n. (b). Presumably, however, where there has been adverse receipt, the rule laid down in *Trustees' & Exors' Co. v. Short*, § 1429, n. (c)) applies.]

(c) *Irish Land Commission v. Grant*, *ubi sup.*

(d) Real Property Limitation Act, 1833, s. 42.

Humfrey v. Gery (1849) 7 C. B. 567 (rent charge).

Archbold v. Scully (1861) 9 H. L. C. 360 (rent service).

[Where there is a personal remedy on a covenant or other specialty, twenty years' arrears can be claimed under it (*Darley v. Tennant* (1883) 53 L. T. 257).]

Disabilities

1431. A person who was a minor, idiot, lunatic, or of unsound mind, when adverse possession of his land was taken, or adverse receipt or non-payment of his rent commenced, has a period of six years after the removal of such disability in which to assert his claim, or so much of such period as will make the total period which has elapsed since such adverse possession, receipt, or non-payment commenced, thirty years and no more.

Real Property Limitation Act, 1874, ss. 3, 5.

[Coverture is now no longer a disability; except in the rare cases which do not fall within the Married Women's Property Act, 1882 (*Lowe v. Fox* (1885) 15 Q. B. D. 667). And absence beyond seas is in no case a disability (Real Property Limitation Act, 1874, s. 4).]

Corporations

1432. A spiritual or eleemosynary corporation sole has the right to distrain for rent, or to bring an action to recover possession of land, at any time (1) during the continuance of the incumbency (if any) which was in existence at the time when the adverse possession commenced, during the next succeeding incumbency, and during a period of six years from the appointment of a third incumbent, or (2) during the period of sixty years immediately following the commencement of the adverse possession — which ever is the longest.

Real Property Limitation Act, 1833, s. 29.

1433. The rights of owners of future interests to recover the land, or rent, when adverse possession has been taken, or there has been receipt, or non-payment, against the owners of preceding interests, are governed by the provisions of Bk. I, §§ 166, 167, *ante*. *Future interests*

Book I, Section V.

1434. A person who, or whose predecessors in title, has or have presented three successive clerks to an ecclesiastical benefice, or, if the incumbencies of such clerks have not together amounted to sixty years, have exercised the right of presentation thereto for a period of sixty years, acquires the advowson of such benefice,^(a) except as against persons for whom he is an express trustee.^(b) And, whatever be the length of such incumbencies, if he or they has or have exercised such right during a period of one hundred years, the rights of all former patrons (not being persons for whom the usurper is an express trustee), are barred.^(c) *Advowsons*

(a) Real Property Limitation Act, 1833, s. 30.

(b) There is no express provision in the Real Property Limitation Acts ~ to this effect. But, presumably, the general principle applies. (See *Re Cross* (1882) 20 Ch. D., at p. 121, *per* Baggallay, L. J.)

(c) *Ibid.*, s. 33.

[For the purposes of the above §, clerks presented on lapse (*ante*, §§ 1277, 1279) are counted; but not clerks presented by the Crown

on promotion of former incumbents to bishoprics (*ibid.*, s. 31). There is, apparently, no provision for disabilities in the recovery of advowsons; and remaindermen who could have been barred by a tenant-in-tail are bound by the tenant-in-tail's neglect (*ibid.*, s. 32).]

Mortgages

1435. An action to foreclose a mortgage of land is, for the purposes of this Title, an action to recover land; ^(a) and a mortgagor of land who has been in possession for twelve years without payment of any part of the principal money or interest, and without acknowledgment in writing of the mortgagee's title, acquires the mortgagee's interest, unless he is an express trustee for the latter. ^(b) When a mortgagee of land has been in possession for twelve years, without giving an acknowledgment in writing to the mortgagor or the person claiming his estate, of the title of the mortgagor, the mortgage cannot be redeemed by the mortgagor or any one claiming through him; ^(c) whether the mortgagor was or was not under disability when his right to redeem first accrued. ^(d)

- (a) *Wrixon v. Vize* (1842) 3 Dr. & W. 104 (Lord St. Leonards).
Heath v. Pugh (1881) 6 Q. B. D. 345.
Harlock v. Ashberry (1882) 19 Ch. D. 539.

[The reasoning appears to be curious; and the opinion of Lindley, J., in *Heath v. Pugh*, at p. 352, that 'a foreclosure decree does not affect possession at all,' is probably the sounder. What if the plaintiff were already in possession?]

- (b) Real Property Limitation Act, 1833, ss. 14, 24, 25.
 Real Property Limitation Act, 1837.
 Real Property Limitation Act, 1874, s. 9.
 (c) *Ibid.*, s. 7.

[For the effect of acknowledgment by or to one of two or more part-claimants, see *ante*, Bk. I, §§ 161, 162.]

- (d) *Kinsman v. Rouse* (1881) 17 Ch. D. 104.
Forster v. Patterson, *ibid.*, 132.

[The effects of acknowledgments of title, and of 'concealed fraud,' by the possessor of land, on the claims of the person out of possession, are dealt with in §§ 160-3, *ante* (Bk. I, Sect. V). To the statements therein contained may be added the observations (a) that there seems to be no provision on either of these points for the case of claims to adowsons (b) that payment of rent by a lessee prevents any claim by the latter to adverse possession prior to such payment, at any rate against the lessor to whom the payment is made (Real Property Limitation Act, 1833, s. 35), and (c) that, even where no rent has been paid for many years, the claim of a lessor for a fixed term revives on the expiry of the term (*Archbold v. Scully* (1861) 9 H. L. C., at p. 375, *per* Lord Cranworth; *Walzer v. Yalden* [1902] 2 K. B. 304).]

1436. The right of the Crown, or the Duke of Cornwall, to take proceedings for or in any wise concerning any hereditaments (other than liberties or franchises), is barred by the lapse of sixty years from the accruer of the right or title of the Crown or the Duke respectively,^(a) even though such lands have been in charge to the Crown or Duchy respectively within the period of sixty years next before the commencement of such proceedings; ^(b) unless the Crown or Duchy, or some of its predecessors in title, has or have been answered, by force and virtue of such right or title, the rents, revenues, issues, or profits thereof within the said period.^(c) But the title of the Crown or Duchy is not destroyed by the lapse of such period;^(d) and, where the interest of the Crown or Duchy has formerly

Crown claims

been in reversion or remainder, such period only begins to run from the time when such reversion or remainder fell into possession, or when, if it had been lawfully created, it would have fallen into possession.^(c)

- (a) Nullum Tempus Act, 1861, s. 1.
Duchy of Cornwall (Limitation of Time) Act, 1860, s. 1. (The principle had been partially extended to claims of the Duchy by s. 71 of the 7 & 8 Vict. (1844) c. 105.)
- (b) Crown Suits Act, 1861, ss. 1, 2. Lands are 'kept in charge' to the Crown or Duchy by being entered on the annual returns drawn up by the revenue officials; even where the returns for the lands are '*Nil.*' (*A.-G. v. Maxwell* (1814) 8 Price, 76 n.; *A.-G. v. Eardley* (1820) *ibid.*, 39). The return thus stands '*insuper* of record.'
- (c) Answering of revenues, or putting in charge, or standing *insuper* of record, of any honour, manor, tenement, or other hereditament, does not affect any part or parcel of it (? held by a different title) (Crown Suits Act, 1861, s. 3).
- (d) *Goodtitle v. Baldwin* (1809) 11 East, at p. 495, *per* Lord Ellenborough, C. J. (Therefore the occupier does not acquire a title as against the Crown; though, probably, he does as against a Crown lessee or grantee (*Doe v. Morris* (1835) 2 Bing. N. C. 189).)
- (e) Nullum Tempus Act, 1768, ss. 3, 4.
Duchy of Cornwall (Limitation of Time) Act, 1860, s. 1.

[*'Possession'* here probably includes receipt or enjoyment of profits or easements.]

NOTE

There appears to be no statutory period of limitation, except as to advowsons (*ante*, § 1434), and, under the last §, for Crown claims, for claims to purely incorporeal hereditaments (*ante*, Sect. I, Tit. IX). But absence of enjoyment or user during a considerable period may be some evidence of a release or abandonment of the right (*Crossley v. Lightowler* (1867) L. R. 2 Ch. App., at p. 482). There was no statutory bar (other than that, if any, created by the Nullum Tempus Act, for the Crown) to claims for recovery of tithe against the tithe-payer; but the latter could prescribe for exemption or a *modus* (see Tithe Prescription Act, 1832).^{*} Apparently, the title to tithe rent charge can now never be barred by lapse of time; but not more than two years' arrears can be recovered (Tithe Act, 1836, s. 81, and *ante*, Sect. I, Tit. IX, §§ 1282-3).

TITLE V — PRESCRIPTION AND CUSTOM

1437. Subject to § 1202 (note) *ante*, and § 1441 *post*, *Immemorial user* any franchise, easement, profit, or rent charge (other than a tithe rent charge),^(a) which might lawfully have been created by grant,^(b) may be acquired by any person by immemorial user,^(c) without proof of express title.^(d) For the purposes of this doctrine, ‘immemorial user’ means user from the first year of Richard I (1189).^(e)

- (a) A claim to a rent service would, in effect, be a claim to an estate, present or future, in the land ; because rent service is always incident to a reversion. And no estate or corporeal hereditament can be claimed by prescription. Apparently, there can be no prescription in respect of a tithe rent charge ; because its origin is known, and, moreover, it could not have been created by grant.
- (b) *Abbot of Strata Marcella’s Case* (1591) 9 Rep., at 25 b.
Foxley’s Case (1601) 5 Rep., at 109 b, 110 a.
Gardner v. Hodgson’s Brewery [1903] A. C., at p. 239, *per* Lord Lindley.
- (c) As prescription can only be for rights which lie in grant, no vague or unincorporated body, such as ‘inhabitants,’ or ‘dwellers’ can prescribe ; because such bodies are incapable of receiving grants (*Constable v. Nicholson* (1863) 14 C. B. N. S. 230).
- (d) Co. Litt. 113–15 (generally).

<i>The King v. Talbot</i> (1633) Cro. Car. 311	} (franchises).
<i>Mayor of Yarmouth v. Eaton</i> (1763) 3 Burr. 1402	
<i>Luttrell’s Case</i> (1601) 4 Rep. 86 a	} (easements).
<i>Popham v. Woolcot</i> (1666) 1 Sid. 291	
<i>Costara’s and Wingfield’s Case</i> (1588) 2 Leon. 44	} (profits).
<i>Dickins v. Hampstead</i> (1729) Fitz. 87	
Y. B. (1339) 13 Ass. fo. 39, pl. 4	} (rents).
<i>Stephens v. Lewis</i> (1599) Cro. Eliz. 673	

[The reported cases of prescription for rent charge are extremely rare ; but it seems to have been assumed in *Sir Moyle Finch’s Case*

(1606) 6 Rep., at 65 b, that a rent charge could be prescribed for. The Y. B. case expressly raises the distinction between rent service and rent charge.]

(e) Co. Litt. 115 a.

[Proof of user continuous, peaceful, open, and as of right, for a period of not less than twenty years may give rise to a presumption of immemorial user, in the absence of inconsistent circumstances, e. g. proof of commencement since 1189 (*Hill v. Smith* (1809) 10 East, 475; Prescription Act, 1832, preamble).]

*Presumption
of lost grant*

1438. Even where immemorial user is not proved, proof of user continuous, peaceful, open, and as of right,^(a) for a period of twenty years, by the claimant, or his predecessors in title, will (subject to § 1439) raise a presumption that the right claimed was granted to the claimant or his predecessor in title, by a person lawfully entitled to make such grant.^(b)

(a) *Monmouth Canal Co. v. Harford* (1834) 1 C. M. & R. 614 (interrupted).

Eaton v. Swansea Waterworks Co. (1851) 17 Q. B. 267 (contentious).

Dalton v. Angus (1881) L. R. 6 App. Ca., at p. 812, *per* Lord Blackburn (generally).

Burrows v. Lang [1901] 2 Ch. 502 (permissive).

Union Lighterage Co. v. Graving Dock Co. [1902] 2 Ch. 557 (secret).

(b) *Bright v. Walker* (1834) 1 C. M. & R., at pp. 217-8, *per* Park, B.

Bryant v. Lefever (1879) 4 C. P. D., at p. 177, *per* Bramwell, B.; approved in

Dalton v. Angus (1881) L. R. 6 App. Ca., at p. 816, *per* Lord Blackburn.

Haigh v. West [1893] 2 Q. B. 19.

[In *Haigh v. West* (subsequently referred to with approval by Cozens-Hardy, J., in *Brown v. Dunstable Corporation* [1899] 2 Ch., at p. 387) the presumption was raised in favour of a claim of a corporeal hereditament. But the general doctrine was fully admitted.]

1439. (Probably) direct evidence may not be ad- *Evidence to*
 duced to show that no grant such as that described *rebut*
 in § 1438 was in fact made.^(a) But the presumption
 of a lost grant will not be raised if there is anything
 in the circumstances of the case which would make
 such a grant impossible,^(b) or unlawful,^(c) or incon-
 sistent with a lawful custom,^(d) or where the user
 relied on is capable of other explanation.^(e)

- (a) On this point there seems to be much difference of opinion. See the views of the different judges and learned lords in the various stages of *Dalton v. Angus* (1877) 3 Q. B. D., at p. 130; (1878) 4 Q. B. D., at pp. 172, 183, 187, 201; (1881) L. R. 6 App. Ca., at pp. 765, 783, 812. The older view clearly was that the presumption of the lost grant could be rebutted (see notes to *Yard v. Ford*, in Wms. Saund. (ed. 1845) II, 175, c).
- (b) e. g. where the presumed grantor or the presumed grantee was incapable of making or receiving such a grant (*Barker v. Richardson* (1821) 4 B. & Ald. 579 (rector); *A.-G. v. G. N. Raily. Co.* [1909] 1 Ch., at p. 778, *per* Neville, J. (corporation); *National Manure Co. v. Donald* (1859) 4 H. & N. 8 (corporation)).
- (c) e. g. as being contrary to a public Act of Parliament (*Neaverson v. Peterborough Council* [1902] 1 Ch. 557); or creating a public nuisance (*Mott v. Shoolbred* (1875) L. R. 20 Eq. 22).
- (d) *Perry v. Eames* [1891] 1 Ch., at p. 667, *per* Chitty, J.
- (e) *Wheaton v. Maple & Co.* [1893] 3 Ch. 48.
A.-G. v. Horner (1912) 107 L. T., at p. 550, *per* Warrington, J.

1440. A right acquired by prescription is per- *Prescriptive*
 petual. *rights per-*
petual
Wheaton v. Maple & Co., ubi sup.

1441. Appendant rights (*ante*, § 1190) cannot be *Appendant*
 claimed by prescription. *rights*

Pill v. Towers (1600) Cro. Eliz. 791. (The reason is, that appendant rights are not supposed to have arisen by grant.)

*Prescription
against the
Crown*

1442. (*Semble*) a claim by prescription can (subject to § 1449) be enforced against the Crown, even apart from statute, if the circumstances warrant the presumption of immemorial user or a lost grant.

Wheaton v. Maple & Co. [1893] 3 Ch. 48.

[This seems to be the true view; in spite of the *dicta* of text-book writers. Indeed, it is difficult to see how, on any other view, franchises could have been acquired by prescription. There is a well-known exception in the case of claims to light under the Prescription Act, 1832 (*post*, § 1449).]

Non-user

1443. A right to an easement or profit, once acquired by prescription or otherwise, cannot be lost by mere non-exercise without abandonment.

Co. Litt. 114 b.

Nowell v. Hicks (1601) *ibid.*

Crossley v. Lightowler (1867) L. R. 2 Ch. App., at p. 482.

[No fixed period of non-user is required to prove abandonment (*R. v. Chorley* (1848) 12 Q. B. 515).]

*Presumption
under the
Act*

1444. Independently of the presumption of immemorial user or a lost grant, when any easement (other than access of light to a building),^(a) of a kind recognized by law, has been actually enjoyed by a person claiming right thereto, without interruption during at least a year,^(b) for a period of twenty years next before the commencement of some action in which such right has been brought in question,^(c) such claim cannot be defeated, even by the Crown or the Duke of Cornwall, merely by showing that such easement was

first enjoyed at a time prior to such twenty years.^(d) A similar rule holds when a similar actual enjoyment of any profit *à prendre* appurtenant^(e) (other than rent, services, or tithe rent charge) has existed for thirty years.^(f) Enjoyment for a shorter period raises no presumption in favour of the claim.^(g)

- (a) *Perry v. Eames* [1891] 1 Ch. 658.
Wheaton v. Maple & Co. [1893] 3 Ch. 48.

[These cases definitely decided that s. 3 of the Prescription Act, 1832 (right to light), does not apply to claims against the Crown.]

- (b) Prescription Act, 1832, s. 4.

[The interruption, to be effective, must be adverse and acquiesced in, i. e. the attention of the person claiming the easement or profit must have been directed to the adverse character of the interruption; and he must have failed to protest or take proceedings (*Glover v. Coleman* (1874) L. R. 10 C. P. 108; *Seddon v. Bank of Bolton* (1882) 19 Ch. D. 462).]

- (c) Prescription Act, 1832, s. 4.
 (d) *Ibid.*, s. 2.
 (e) *Shuttleworth v. Le Fleming* (1865) 19 C. B. N. S. 687, laid it down that profits in gross are not within the scope of the Prescription Act.
 (f) Prescription Act, 1832, s. 1.
 (g) *Ibid.*, s. 6.

[The enjoyment must be open, notorious, and as of right (*Lyell v. Lord Hothfield* [1914] 3 K. B. 911).]

1445. When an easement of the kind described in § 1444 has been enjoyed in the manner described in such §, for a period of forty years calculated as described in the said §, or when a profit of the kind described in such § has been taken in such manner for a period of sixty years so calculated, the right *Absolute title under the Act*

thereto is deemed absolute and indefeasible; unless it appears that such easement or profit was enjoyed or taken by express consent or agreement by deed or writing.

Prescription Act, 1832, ss. 1, 2.

[The consent or agreement need not be signed by the owner of the alleged servient tenement (*Bewley v. Atkinson* (1879) 13 Ch. D. 283). *Quære*: would an agreement not inconsistent with the claim deprive the claimant of the protection of the statute?]

*Common
landlord*

1446. No person can acquire a right under §§ 1444 or 1445, by virtue of enjoyment or taking as against a lessee whose lessor is also lessor of the tenement occupied by the claimant and his predecessors in title, in respect of which such right is claimed.

Gayford v. Moffatt (1868) L. R. 4 Ch. App. 133.

Kilgour v. Gaddes [1904] 1 K. B. 457.

[Such a claim would, in effect, be a claim of adverse enjoyment against the claimant's own lessor, which is contrary to the principle of tenure (*Gayford v. Moffatt*, *ubi sup.*, at p. 135, *per* Lord Cairns, C.). But, *semble*, an easement can be acquired in favour of one copyhold tenement against another in the same manor (*Derry v. Sanders* [1919] 1 K. B. 223).]

Disabilities

1447. In cases of claims under § 1444 (but not of claims under § 1445), the time during which the person entitled to resist the claim is an infant, idiot, *non compos mentis*, *feme covert*,^(a) or tenant for life,^(b) or during which any action (? involving title to the alleged servient tenement) has been diligently prosecuted,^(c) is excluded in computing the periods re-

ferred to in such § 1444;^(d) and enjoyment or taking interrupted only by such disabilities will be deemed continuous.^(e)

- (a) Probably, as regards a *feme covert*, this section is in effect repealed by the Married Women's Property Act, 1882, in cases to which that Act applies.
- (b) Unless the provisions of the next § are held (contrary to the express words of s. 8) to apply to all claims (other than claims to light) under the Act, there would seem to be a gross omission here in respect of profits *à prendre* claimed by virtue of enjoyment against tenants for years. In prescription at the common law, enjoyment against a lessee for years was ineffectual; because such lessee could not have granted a right which would have bound his lessor.
- (c) Some restriction must be applied to the vague words of the section. But it is difficult to know whether the action referred to is supposed to have been an action to contest the claim in question, or an action involving title to the servient tenement.
- (d) Prescription Act, 1832, s. 7.
- (e) *Clayton v. Corby* (1842) 2 Q. B. 813. (But a *de facto* interruption by the person under disability breaks the continuity of the enjoyment by the claimant (*Ibid.*, at p. 825, *per* Lord Denman, C.J.).)

1448. When the servient tenement in respect of *Leases* which a claim to a 'way or other convenient water-course or use of water' is put forward under the Prescription Act, 1832, has been held for any term of life or any term of years exceeding three from the granting thereof, the time of enjoyment of such 'way or other matter' during the continuance of such term, will be excluded in the computation of the period of forty years described in § 1445, in case the claim is resisted by a reversioner (but not a remainderman)^(a) expectant on the determination of

such term, within three years from the determination thereof.^(b)

- (a) *Laird v. Briggs* (1881) 19 Ch. D., at p. 30, *per* Jessel, M. R.
Symons v. Leaker (1885) 15 Q. B. D. 629.
- (b) Prescription Act, 1832, s. 8.

[The wording of s. 8 is even more open to criticism than that of the other sections of the Prescription Act. It has been suggested (*Laird v. Briggs*, *ubi sup.*, at p. 33) that the word 'convenient' in line 2 of the § should read 'easement'; but the change would hardly make the section a model of the draftsman's art, and the point has been expressly left open by the C. A. (*ibid.*). The suggestion of Manisty, J., in *Symonds v. Leaker*, *ubi sup.*, at p. 634, to the effect that s. 8 applies to claims of light under s. 3, seems wholly inconsistent with the wording of s. 8, which refers exclusively to 'the said period of forty years.']

*Claims of
light*

1449. Where the access of light to a building has been actually enjoyed therewith^(a) for the full period of twenty years without interruption, calculated as described in § 1444,^(b) the right thereto is (subject to § 1244, *ante*)^(c) deemed absolute and indefeasible, except as against the Crown and its tenants;^(d) unless it appears that the same was enjoyed by some written consent or agreement expressly made or given for that purpose.^(e)

- (a) Enjoyment as of right is not necessary, if the permission does not satisfy the requirements of the section (*Bewley v. Atkinson* (1879) 13 Ch. D., at p. 296, *per* Thesiger, L. J.; *Hyman v. Van den Bergh* [1907] 2 Ch., at p. 530, *per* Parker, J.).
- (b) Prescription Act, 1832, s. 4.
- (c) *Hyman v. Van den Bergh* [1908] 1 Ch. 167. It has been held, however, (*Simper v. Foley* (1862) 2 J. & H. 555; *Ladyman v. Grave* (1871) L. R. 6 Ch. App., at p. 768, *per* Lord Hatherley, C.), that when the enjoyment has been suspended by unity of possession, enjoyment prior to the suspension may be added to

the period immediately following its removal. But see these cases criticized by Farwell, L. J., and Parker, J., in *Hyman v. Van den Bergh*, *ubi sup.*

- (c) i. e., only a reasonable quantity of light can be claimed. (See § 1244 for details.)
- (d) *Perry v. Eames* [1891] 1 Ch. 658.
Wheaton v. Maple & Co. [1893] 3 Ch. 48.
- (e) Prescription Act, 1832, s. 3. (The consent or agreement need not be signed by the owner of the alleged servient tenement (*Bewley v. Atkinson*, *ubi sup.*). *Quære*: would an agreement not inconsistent with the claim deprive the claimant of the protection of the statute?)

1450. A claim of light under § 1449 can be maintained, even though, during the whole of the alleged period of enjoyment, the servient tenement has been in the occupation of a lessee of the person who is also owner in fee of the tenement to which the right is claimed as appurtenant. *Even against common landlord*

Morgan v. Fear [1907] A. C. 425.

Richardson v. Graham [1908] 1 K. B. 39.

[*A fortiori*, the right can be secured by enjoyment against the lessee of a stranger (*Simper v. Foley* (1862) 2 J. & H. 555).]

1451. A claim of light may be maintained under § 1449; notwithstanding that it is inconsistent with a local usage or custom. *Local custom*

Prescription Act, 1832, s. 3.

[Thus, for example, it overrides the custom of London, to the effect that the owner of an ancient building may pull it down and erect another of any height, notwithstanding any claim of light by a neighbour (*Salter's Co. v. Jay* (1842) 3 Q. B. 109; *Truscott v. Merchant Tailors' Co.* (1856) 11 Ex. 855).]

*Proof of
custom*

1452. An immemorial custom, which will create a right over land of the kind described in Sect. I, Tit. X, *ante*, may be proved by evidence showing usage, long,^(a) continuous,^(b) and peaceable, and not explained by causes inconsistent with the existence of the alleged custom.^(c) (*Semble*) the Prescription Act, 1832, has no application to proof of custom.^(d)

- (a) The period suggested by the cases is at least fifty years, *i. e.* the average memory of the 'oldest inhabitant' (*Hammerton v. Honey* (1876) 24 W. R., at p. 604, *per* Jessel, M. R.).

[In *Brocklebank v. Thompson* [1903] 2 Ch., at p. 350, Joyce, J., suggested that twenty years might be sufficient; and referred to *R. v. Joliffe* (1823) 2 B. & C. 54. But *R. v. Joliffe* was not a case of rights over land.]

- (b) *Bastard v. Smith* (1837) 2 Moo. & R., at p. 136, *per* Tindal, C. J.
Hammerton v. Honey, *ubi sup.*
Mercer v. Denne [1905] 2 Ch. 538.
(c) *Simpson v. Wells* (1872) L. R. 7 Q. B. 214.
(d) *Mounsey v. Ismay* (1865) 3 H. & C. 486.
Shuttleworth v. Le Fleming [1865] 19 C. B. N. S. 687.

[The view of the Court in these cases was, that rights in gross were not contemplated by the framers of the Prescription Act. But might not appurtenant rights be claimed by custom? And, whether this be so or not, the view of the Courts which decided the two last mentioned cases has been questioned by the Court of Appeal (*Mercer v. Denne*, *ubi sup.*, at p. 586). Probably, customary rights (other than those arising out of copyhold tenure) are not alienable.]

SECTION V

INVOLUNTARY ALIENATION OF LAND

1453. Upon an adjudication in bankruptcy, all the property of the bankrupt (including the capacity to exercise for his own benefit any power of disposition, other than the nomination to a vacant ecclesiastical benefice)^(a) passes to his trustee in bankruptcy;^(b) and the title of the trustee, subject to the claims of *bonâ fide* purchasers for value before the date of the receiving order,^(c) relates back to the commencement of the bankruptcy.^(d) All property and powers, of the kind above described, acquired by the bankrupt prior to his discharge, likewise pass to the trustee, in manner and subject to the exceptions specified in Bk. I, § 70, *ante*.^(e)

*Adjudication
in bank-
ruptcy*

(a) Bankruptcy Act, 1914, s. 38 (b).

[All property held by the bankrupt as trustee for other persons is expressly excepted by the Act (s. 38 (1)). There is some doubt whether the section covers special powers of appointment. It has been held not to apply to a release of such a power (*Re Rose* [1904] 2 Ch. 348). But the order was discharged on appeal, by consent; on the ground that all parties were not represented (*Re Rose* [1905] 1 Ch. 94).]

(b) *Ibid.*, s. 18 (1).

[Upon the making of the receiving order, the property passes into the custody of, but does not vest in, the official receiver (*Ibid.* s. 7 (1).)]

(c) *Ibid.* s. 45.

[Probably the protection of this s. is not confined to purchasers who take directly from the bankrupt (*Re Slobodinsky* [1903] 2 K. B., at p. 532, *per* Wright, J.). It certainly is not so confined in the case of a voluntary settlement, sought to be set aside under s. 47 of the Act (*Re Hart* [1912] 3 K. B. 6); though in that case there is no express saving to that effect in the section.]

(d) *Ibid.*, s. 37 (1). (By this section, the commencement of the bankruptcy is to be deemed to be the committing of the act of bankruptcy upon which the receiving order was made, or, if the bankrupt has committed more acts of bankruptcy than one, then the first within three months prior to the presentation of the bankruptcy petition.)

(e) *Ibid.*, s. 38 (a).

*Disclaimer of
onerous prop-
erty*

1454. Any lease or other interest in land burdened with onerous covenants, belonging to the bankrupt, and any property of the bankrupt that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or the payment of any sum of money, may be disclaimed in writing by the trustee at any time within twelve months after the first appointment of a trustee (in that bankruptcy),^(a) or, if the existence of such interest has not come to the knowledge of the trustee within one month after such appointment, then, within twelve months after he first became aware thereof.^(b) But a trustee in bankruptcy may not: —

- (i) disclaim any lease, otherwise than in accordance with General Rules made under the Bankruptcy Acts, without the leave of the Court; and the Court may, before granting leave, impose such conditions and make such orders as it thinks just; ^(c)
- (ii) disclaim any property, when an application in writing has been made to him by any person interested therein, requiring him to decide whether he will disclaim or not, and the trustee has, for a period of twenty-eight days after receipt of the application (or such extended period as may be allowed by the Court), failed to give notice whether he disclaims or not. ^(d)

(a) The words in brackets are not in the Act; but, presumably, they must be implied.

(b) Bankruptcy Act, 1914, s. 54 (1). (The Court may extend the period.)

(c) Bankruptcy Act, 1914, s. 54 (3). The effect of rule 276 of the Bankruptcy Rules, 1914, is, that a lease may be disclaimed without leave when (i) the premises have not been sublet or mortgaged by the bankrupt, *and either* the rent and value of the premises as assessed for property tax are less than £20 a year, *or* the estate is administered as a 'small bankruptcy' under s. 129, *or* the trustee gives notice to the lessor of his intention and the lessor does not, within seven days, give a counter-notice requiring the matter to be brought before the Court, or when (ii) the bankrupt has sublet or mortgaged, and neither the lessor nor the sublessee or mortgagee, after fourteen days' notice, requires the matter to be brought before the Court. In other cases, a disclaimer without leave is void (R. 276 (2)).

(d) *Ibid.*, s. 54 (4).

*Effect of
disclaimer*

1455. A disclaimer under § 1454 operates to extinguish the rights, interests, and liabilities of the bankrupt in respect of the property disclaimed, as from its date, and to discharge the personal liability of the trustee as from the date when the property vested in him; but not otherwise to affect the rights or liabilities of other persons.

Bankruptcy Act, 1914, s. 54 (2).

[Of course all parties injured by the disclaimer may prove against the estate of the bankrupt to the extent of such injury (*ibid.*, s. 54 (8)).]

*Vesting
orders*

1456. The Court may, on application by any person interested in, or remaining affected by, any liability in respect of the property disclaimed, vest the property in any person entitled thereto, on such terms as the Court may think just. But where the property is of a leasehold nature, the Court may not vest it in any person claiming under the bankrupt, except upon the terms of making such person liable to perform the obligations which were incumbent on the bankrupt in respect of such property at the time of the presentation of the bankruptcy petition.

Ibid., s. 54 (6).

[Any mortgagee or sub-lessee of the bankrupt refusing to accept a vesting order in such terms, may be excluded from all interest in the property, which may then be vested in any person liable on the lessee's covenants, freed from all interests therein created by the bankrupt (*ibid.*). The terms mentioned in the § may, however, be modified to a certain extent by the Court.]

INVOLUNTARY ALIENATION OF LAND 863

1457. All present interests in land belonging to a *Execution* judgment debtor, including estates tail, can be taken in execution, and realized to satisfy a judgment of the High Court.

Judgments Act, 1838, ss. 11, 13.

[The methods of execution are, however, various. Thus, ordinary freehold and copyhold legal estates in possession, including estates tail (which, under the Statute of Westminster II, were only extendible during the life of the tenant in tail (*Anderson's Case* (1597) 7 Rep., at 21 b)) and including estates held in trust exclusively for the debtor, can be seized by the sheriff under an *Elegit*, and handed over to the creditor, who holds them until the revenues have satisfied his claim (Judgments Act, 1838, ss. 11, 13), or, if he prefers, may obtain an order for sale (*ibid.*, s. 13). Legal estates for years, but, probably, not even simple trusts of such estates (*Re D. of Newcastle* (1869) L. R. 8 Eq., at p. 707, *per* Lord Romilly, M. R.) can be sold by the sheriff as chattels under a writ of *Fi. Fa.*, and the proceeds employed in discharge of the debt (*Taylor v. Cole* (1789) 3 T. R. 292); and (probably) legal estates for years may also be seized under an *Elegit* (*Fleetwood's Case* (1610) 8 Rep., at 171 a). Equities of redemption, and trusts of estates for years, can be taken in execution by the appointment of a receiver, and subsequent sale under s. 13 of the Judgments Act, 1838, which is expressed to apply to all kinds of interests in land, present and future, including incorporeal hereditaments and powers of appointment for the debtor's own benefit (*Harris v. Davison* (1846) 15 Sim. 128). The provision of s. 13, to the effect that no sale should be allowed till one year after registration, was modified by s. 4 of the Judgments Act, 1864; and it has been more than once judicially suggested (*Re D. of Newcastle, ubi sup.*, at p. 706; *Re Bailey's Trusts* (1869) 38 L. J. Ch., at p. 239, *per* Malins, V. C.), that the latter enactment has, though in some respects more narrowly worded, repealed the former. Notwithstanding the wide words of s. 13, a receiver will not be appointed of a future legal estate, or, at least, if he is appointed, his appointment will not be a 'delivery in execution' of such estate (*Re Harrison and Bottomley* [1899] 1 Ch. 465); and it is quite certain that a future legal estate cannot be sold under an *Elegit* (*Re South* (1874) L. R. 9 Ch. App. 369). But, *semble*, the registration of such a writ would effect a charge on the estate, which might be enforced by an

F F

application to the Court (*Ld. Ashburton v. Norton* [1915] 1 Ch. 274). A County Court cannot issue direct execution against land; but a County Court judgment for upwards of £20 (exclusive of costs) may, in default of goods, be removed by Certiorari into the High Court, and enforced as a High Court judgment (County Courts' Act, 1888, s. 151). The Crown enjoys the special privilege of seizing the lands of its debtor, and even of his debtors, without first proceeding to judgment, by writ of extent (33 Hen. VIII (1541) c. 39, s. 37; *B. of Rochester v. Le Fanu* [1906] 2 Ch., at p. 518, *per* Swinfen Eady, J.).]

*Registration
necessary*

1458. No judgment or Crown debt affects any land; until and unless a writ or order for the purpose of enforcing it is for the time being registered under the Land Charges Registration and Searches Act, 1888, s. 5.

Land Charges Act, 1900, s. 2.

[In *Johnson v. Burgess* (1873) L. R. 15 Eq. 398, it was laid down by James, L. J., that a registered writ of sequestration, though actually enforced by seizure of the sequestered person's real estate, was not a delivery in execution within the meaning of the Judgments Act, 1864. But it is to be observed that the Land Charges, &c., Act, 1888, s. 5 (1) makes provision for the registration of orders appointing sequestrators of land.]

Disclaimer

1459. Any legal estate may be forfeited by disclaimer, on the part of the tenant, of the lord's title, in manner and subject to the reservations contained in § 1039 (iii), *ante*, and, in the case of a copyhold estate, by any breach of custom for which a forfeiture is the customary penalty (*ante*, Sect. I, Tit. V, 1092, 1095).

1460. Any estate may be forfeited by breach of *Forfeiture* express condition, in manner, and subject to the restrictions, described in Sect. III, Tit. I, §§ 1368-1374, *ante*.

1461. An unlawful conveyance to a corporation *Mortmain* in mortmain (*post*, Sect. VII, Tit. III) works a forfeiture to the Crown of the interest conveyed, subject to the rights of mesne lords (if any), but does not affect any rent or service due in respect of such interest.

Mortmain and Charitable Uses Act, 1888, ss. 1, 3.

[The theory is, that an unlawful assurance in mortmain works a forfeiture to the immediate lord; and, until the passing of the 7 & 8 Will. III (1696) c. 37, the licence of the Crown alone was not sufficient to authorize the assurance. But owing to the operation of the statute *Quia Emptores* (*ante*, § 1174, n. (a)), it is, in most cases, impossible to identify the mesne lords of a freehold fee simple; and the Crown takes in default of claim by mesne lords. The rights of the latter are specified in subs. 2, of s. 1 of the Act of 1888. Alienation of land for charitable purposes, which does not work a forfeiture, is dealt with under Sect. VII, Tit. IV, *post*.]

1462. Any agreement concerning an advowson or *Simony* next presentation to an ecclesiastical benefice, made with a view of procuring a corrupt nomination to the benefice, works a forfeiture of the next presentation to the Crown.

31 Eliz. (1589) c. 6, s. 4.

The King v. The Bishop of Oxford (1806) 7 East, 600.

[Most of the merely technical forms of simony, which grew up from the interpretation of the Elizabethan statutes, have ceased to exist as the result of the passing of the Benefices Act, 1898 (*ante*, Sect. I, Tit. IX; §§ 1271-3). But it is conceived that actual corrupt bargains still entail the old penalty.]

F F 2

SECTION VI

OVERRIDING POWERS AFFECTING LAND

TITLE I—POWERS OF APPOINTMENT

*Classes of
powers*

1463. A power of disposing of an interest in land may be conferred on any person; ^(a) whether such person has any interest in such land or not. ^(b) If the donee of the power has no interest in the land, such power is a power ‘collateral.’ ^(c) If the donee has an interest, but it would not be affected by the exercise of the power, such a power is ‘in gross.’ ^(d) If the donee’s interest would be affected by the exercise of the power, such a power is ‘appendant.’ ^(e)

- (a) It seems to be generally assumed, that a power to dispose of land can only be created by deed or testament. But, regard being had to the history of powers (see note below), it is difficult to find any express authority for the restriction. Perhaps, however, though a power is not a trust (*A.-G. v. Downing* (1767) Wilmot, at p. 23; *Dickenson v. Teasdale* (1862) 1 De G. J. & S., at p. 60, *per* Lord Westbury, C.), yet, inasmuch as it would be difficult to create a power of appointment otherwise than by means of a trust, s. 7 of the Statute of Frauds (1677) might be held to require writing.
- (b) There was at one time a doctrine that a power of disposition could not exist separately in an owner in fee. But this doubt was dispelled in *Sir Edward Clere’s Case* (1599) 6 Rep. 17 b; followed by Lord Eldon in *Maundrell v. Maundrell* (1804) 10 Ves. 246.
- (c) *Edwards v. Slater* (1665) Hardr., at p. 413, *per* Hale, C. B. *Dickenson v. Teasdale*, *ubi sup.*, at p. 59, *per* Lord Westbury, C.
- (d) *Re D’Angibau* (1880) 15 Ch. D., at p. 232, *per* Jessel, M. R. *Nottidge v. Dering* [1909] 2 Ch. 647.
- (e) *Penne v. Peacock* (1734) Ca. temp. Talb. 41. (The expression ‘appendant’ does not, however, appear in the report.) *Re D’Angibau*, *ubi sup.*

[The Common Law courts knew, in a limited class of cases, of powers of disposition over the legal estate in land, e. g., the power which a landowner, under local custom, might confer on his executors, to sell his lands for the payment of his debts or other purposes. After the passing of the Statute of Wills, 1540, such 'common law' powers were created by testators independently of custom; and were in familiar use until the passing of the Land Transfer Act, 1897, though they could only be employed to create 'common law' estates, i. e., estates such as could have been limited by feoffment or other common law conveyance. But there can be little doubt that, historically speaking, the bulk of the modern powers of appointment or disposition of land are derived from the practice, early established, of conveying lands to feoffees, to hold upon the uses to be declared by the donor's testament. The subsequent testament was, in effect, a declaration of uses, which, before 1535, were, of course, purely equitable. The passing of the Statute of Uses, in that year, put a temporary stop to the exercise of powers of appointment of land by testament. But it only rendered more efficacious the exercise of powers *inter vivos*; and, after the passing of the Statute of Wills, in 1540, the practice of appointing by testament revived. 'Equitable' powers, or powers which only enable the donee to appoint equitable interests, are, however, still recognized; and, when they are duly exercised, the owners of the legal estate must convey in accordance with the appointment (*Re Brown* (1886) 32 Ch. D., at p. 601, *per* Kay, J.). For the important differences between the effect of the exercise of legal and of equitable powers, see *Cloutte v. Storey* [1911] 1 Ch. 18.]

1464. Powers of appointment are either 'general,' where the donee may exercise them in favour of any persons he pleases;^(a) or 'special,' where the donee may only exercise the power in favour of a limited class of persons.^(b) The donee of a general power may exercise it in his own favour, or in favour of the donee's wife or husband.^(c)

*General and
special
powers*

- (a) *Mackinley v. Sison* (1837) 8 Sim. 561.
- Bristow v. Skirrow* (1859) 27 Beav. 585.
- (b) *Bristow v. Warde* (1794) 2 Ves. 336.

- (c) *Holder v. Freston* (1769) 2 Wils. K. B., at p. 402, *per Curiam*.
Irwin v. Farrer (1812) 19 Ves. 86.
Wood v. Wood (1870) L. R. 10 Eq. 220.

[A general power of appointment is, for most purposes, equivalent to ownership, and is treated as such. It passes (if exercisable by act *inter vivos*) to the donee's trustee in bankruptcy for the benefit of his creditors (*ante*, § 1453); and, if exercised by his testament, it makes the property appointed assets for payment of his debts after his death (*post*, Bk. V).]

*Form of
appointment*

1465. Generally speaking, a power of appointment can only be exercised in manner and with the formalities prescribed by the settlement creating the power, and by an act intended to exercise the power.

Hughes v. Wells (1852) 9 Ha., at p. 763, *per Turner*, V. C.
Re Sanderson [1912] W. N. 54.

But:—

- (i) a power to appoint by testament must be exercised (if at all) by a document conforming to the requirements of the Wills Act, 1837; and a testamentary power so exercised will, as respects the execution and attestation thereof, be valid;

Wills Act, 1837, s. 10.

- (ii) a power to appoint by deed or writing not testamentary will be validly exercised, so far as execution and attestation are concerned, by an appointment made by deed attested by two or more witnesses in the

manner in which deeds are ordinarily attested ;

Law of Property Amendment Act, 1859, s. 12.

[Of course, all additional requirements of substance, e. g. the consent of a third party, must be fulfilled.]

- (iii) a general devise or bequest of the real or personal estate of the testator, or of his real or personal estate in any place, or in the occupation of any person mentioned in his testament, or otherwise described in a general manner, will be construed to include any estate, or any estate to which such description may extend, which he may have power to appoint in any manner that he may think proper, unless a contrary intention appears by the testament ;

Wills Act, 1837, s. 27.

[It should be noted that, while no power that is not 'general,' in the sense of § 1463, can fall within this s. of the Wills Act (*Re Williams* (1889) 42 Ch. D. 93), yet it is not every such power which does fall within it (*Phillips v. Cayley* (1889) 43 Ch. D. 222 ; *Re Davies* [1892] 3 Ch. 63). It seems, however, that an ordinary general testamentary power will do so (*Re Doberty-Waterhouse* [1918] 2 Ch. 269). A difficult problem arises when an attempted exercise of a general testamentary power fails by reason of the death of the appointee before the testator, or for any other reason. Is the fund then assets for payment of the testator's debts and legacies ? The answer depends upon whether the testator is deemed to have "made the fund his own for all purposes" (*Re Marten* [1902] 1 Ch. 314). It seems now to be settled, that a mere appointment of an executor, followed by a direction to pay debts and legacies, will be a sufficient exercise of the power to make the fund assets for that purpose (*Re Seabrook* [1911] 1 Ch. 151).]

- (iv) the Court, in its discretion, may, where the appointor's intention is clear,^(a) supply any want or defect^(b) in the exercise of the power, not going to the substance thereof,^(c) in favour of creditors,^(d) purchasers,^(e) a wife,^(f) or blood relatives of the donee of the power,^(g) or charities.^(h)

- (a) *Carver v. Richards* (1859) 27 Beav., at p. 495, *per Romilly*, M. R.
 (b) *Cockerell v. Cholmeley* (1830) 1 Russ. & M., at p. 424, *per Leach*, M. R.
 (c) Thus, though the Court may support an exercise by testament instead of by deed (*Sneed v. Sneed* (1747) 1 Ambl. 64), the converse will not hold; because, by executing a deed, the donee relinquishes that power of revocation which the settlor intended him to retain until his death (*Reid v. Shergold* (1805) 10 Ves. 370). Nor will Equity ever supply the non-exercise of a power (*Buckell v. Blenkborn* (1845) 5 Ha. 131); unless, possibly, where the exercise has been prevented by the fraud of a party taking in default of appointment.
 (d) *Pollard v. Greenvil* (1662) 1 Ca. Cha. 10.
Wilkie v. Holme (1752) 1 Dick. 165.
 (e) *Cotter v. Layer* (1731) 2 P. Wms. 623.
Re Dykes' Estate (1869) L. R. 7 Eq. 337.
 (f) *Tollet v. Tollet* (1728) 2 P. Wms. 489.
Chapman v. Gibson (1791) 3 Bro. C. C. 230.

[But not in favour of a husband (*Moodie v. Reid* (1816) 1 Madd. 516).]

- (g) *Lucena v. Lucena* (1842) 5 Beav. 249.
Morse v. Martin (1865) 34 Beav. 500.

[There is, however, some doubt whether a defective exercise in favour of children will be aided at the expense of others in the same position who are not provided for (*Morse v. Martin*, *ubi sup.*). And the Court will not intervene in favour of an illegitimate child (*Bramhall v. Hall* (1764) 2 Ed. 219).]

- (h) *A.-G. v. Burdet* (1717) 2 Vern. 755.
Piggot v. Penrice (1717) Gilb. Eq. Ca. 137.
Innes v. Sayer (1848) 7 Ha. 384.

1466. Any exercise of a special power of appointment with an object inconsistent with the intention of the settlor, will, though formally correct, be set aside *in toto* by the Court as a 'fraud on the power';^(a) but the rights of purchasers of the legal estate for value *bonâ fide* acquired under the exercise will not be affected.^(b) In other respects, it is immaterial that the appointee was not aware of the fraudulent character of the appointment.^(c)

Frauds on powers

- (a) *Hinchinbrooke v. Seymour* (1784) 1 Bro. C. C. 395.
Daubeny v. Cockburn (1816) 1 Mer. 626.
D. of Portland v. Topham (1864) 11 H. L. C. 32.
Re Kirwan's Trusts (1883) 25 Ch. D. 373.
- (b) *McQueen v. Farquhar* (1805) 11 Ves., at p. 478, *per* Lord Eldon, C.
- Cloutte v. Storey* [1911] 1 Ch. 18.
- (c) *Wellesley v. Mornington* (1855) 2 K. & J. 143.
Re Marsden's Trusts (1859) 28 L. J. Ch. 906.

1467. The donee of any power of appointment, whether coupled with an interest or not, may disclaim it,^(a) or may by deed release it or contract not to exercise it.^(b)

Disclaimer and release of powers

- (a) Conveyancing Act, 1882, s. 6.
- (b) Conveyancing Act, 1881, s. 52.

[It has been expressly decided, that a married woman, though restrained from anticipation, and though married before 1882, may release by ordinary deed (in conjunction with her husband) a power conferred on her by settlement made before that date (*Re Chisholm* [1901] 2 Ch. 82); and there seems to be no reason why such a person should not disclaim under the Conveyancing Act, 1882. Disclaimer or release of a power may, of course, be a breach of trust, and, therefore, invalid in equity (*Re Eyre* (1883) 49 L. T. 259); but, generally speaking, the rules as to 'frauds on powers' do not apply to releases (*Re Somes* [1896] 1 Ch. 250).]

*Survival of
powers*

1468. Generally speaking, and subject to §1453, *ante*, a power of appointment can only be exercised by the person or persons on whom it is conferred.

Mansell v. Mansell (1757) Wilm., at p. 50, *per* Wilmot, L. C.
Brassey v. Chalmers (1852) 16 Beav. 223.

But, subject to any contrary expression in the settlement:—

- (i) when a power conferred on two or more persons is disclaimed by one of them, the power may be exercised by the other or others, or the survivors or survivor of the others;

Conveyancing Act, 1882, s. 6 (2).

[The Act says ‘on’ such disclaimer; but, presumably, ‘on’ means ‘after.’]

- (ii) when, by a settlement coming into operation after 31st December, 1881, a power is conferred on two or more trustees jointly, the power may be exercised by the survivor or survivors of them for the time being;

Trustee Act, 1893, s. 22.

- (iii) until the appointment of new trustees under such a settlement, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees, of the last surviving or continuing trustee, may exercise any power conferred on, or ca-

pable of being exercised by, the sole or last surviving or continuing trustee.

Conveyancing Act, 1911, s. 8.

[Apparently, none of the above provisions covers the case of a power conferred upon two or more persons (not being trustees) by name, and the death of one or more of them, without disclaimer. In such a case, the survivors cannot exercise the power (*Montefiore v. Brown* (1858) 7 H. L. C. 241). There is, possibly, a distinction where powers are conferred on a class (*Lee v. Vincent* (1584) Cro. Eliz. 26), or where the power is annexed to an estate (*Mansell v. Mansell* (1757) Wilm., at p. 48, *per Wilmot*, L. C.).]

1469. Subject to contrary expressions in the settlement, a power is not exhausted by the exercise thereof, so long as any property remains which the donee might have originally affected by the exercise of such power;^(a) and the alienation of an estate to which a power is incident will not extinguish the power.^(b) But the donee of the power cannot, except where he has expressly and lawfully reserved a power of revocation,^(c) exercise the power in derogation from his own previous conveyance or appointment.^(d) *Repeated exercise*

(a) *Bovey v. Smith* (1682) 1 Vern., at p. 85, *per Curiam*.

Hervey v. Hervey (1739) 1 Atk. 561.

(b) *Alexander v. Mills* (1870) L. R. 6 Ch. App. 124.

[The rule extends to involuntary alienations, e. g. by the bankruptcy of the donee of the power (*Holdsworth v. Goose* (1860) 29 Beav. 111; *Master's Settlement* [1911] 1 Ch. 321).]

(c) *Witbam v. Bland* (1674) 3 Swanst. 277 n., *per Lord Nottingham*, C.
Saunders v. Evans (1861) 8 H. L. C. 721.

(d) *Simpson v. Bathurst* (1869) L. R. 5 Ch. App. 193.

*Limits of
special
powers*

1470. Where a special power of appointment is created by a settlement, no limitation in exercise of that power which would have been invalid in the settlement, will be valid in the appointment.

Cook v. Duckenfield (1743) 1 Atk. 562, *per* Lord Hardwicke, C.
Mosley v. Mosley (1800) 5 Ves., at p. 258, *per* Arden, M. R.
Re Norton [1911] 2 Ch. 27.

[Consequently, for example, an appointment which, if it had been made in the settlement, would have violated the Rule against Perpetuities, is void (*Re Norton, ubi sup.*); though, if the appointment had been an independent instrument, it would not have violated the rule (*post*, Sect. XV, Tit. III). But the doctrine in the § must not be pushed too far, *e. g.* so as to overlook the date of the exercise of the power.]

*Illusory
appointments*

1471. No objection can be taken to the exercise of a special power of appointment, on the ground that one or more of the objects of the power is excluded by such exercise from the benefit thereof; except in so far as the settlor has declared the amount or share from which no object of the power, or some one or more object or objects of the power, shall not be excluded.

Powers of Appointment Act, 1874, ss. 1, 2.

[Before the passing of the Illusory Appointments Act, 1830, special powers of appointment were classified, according to the construction put by the Court on the words of the settlor, as 'exclusive' (i. e. those in which the donee of the power was at liberty to exclude any of the objects of the power from participation in the property) and 'distributive' or 'non-exclusive' (i. e. those in which the donee could only decide the proportions in which the objects should take, without excluding any one entirely). In order

to prevent an evasion of this distinction, the Court held that, in the case of a non-exclusive power, a *substantial* share must, if the power was to be well exercised, be given to each object. This rule was modified by the Act of 1830; but the necessity of appointing *some* share to every object of a non-exclusive power remained till the passing of the Act of 1874, which is retrospective.]

1472. Where a special power of appointment is accompanied by a gift over of the property in default of appointment, the property vests at once in the person or persons entitled in default of appointment, but subject to divesting in the event of the exercise of the power.^(a) And where there is no provision in default of appointment, a gift of either the capital or the income of the property may, where the general intention of the settlor to benefit the objects of the power is clear,^(b) be implied (even in a settlement by deed) in favour of the objects of the power. But, in such a case, only those persons can take in default of appointment who might have taken under an exercise of the power.^(c)

- (a) *Doe v. Martin* (1790) 4 T. R. 39.
Lambert v. Thwaites (1866) L. R. 2 Eq. 121.

[The consequence is, that the representatives of members of a class, who die before default of appointment, will share in the distribution (*Lambert v. Thwaites*, *ubi sup.*).]

- (b) *Richardson v. Harrison* (1885) 16 Q. B. D. 85.
Re Weekes' Settlement [1897] 1 Ch. 289.
 (c) *Kennedy v. Kingston* (1821) 2 Jac. & W. 431 } (capital).
Walsb v. Wallinger (1830) 2 Russ. & M. 78 }
Re Master's Settlement [1911] 1 Ch. 321.

[In the two earlier cases, some stress was laid on the fact that the power was 'non-exclusive' (*ante*, § 1471, n.). But, *semble*, the rule has not been altered by the passing of the Powers of Appointment Act. (See, however, *Re Weekes' Settlement*, *ubi sup.*, and the language of *Romer, J.*) The latter part of the rule, where the power is testamentary only, excludes from participating in the property all persons who die in the lifetime of the donee of the power (*Kennedy v. Kingston*, *Walsh v. Wallinger*, *ubi sup.*)]

*Excessive
exercise of
power*

1473. Where an appointment, made in exercise of a power, is partly authorized by such power, and partly unauthorized, either because it includes persons not the objects of the power,^(a) or because a condition is annexed to the taking effect of the appointment which is not authorized by the power,^(b) or otherwise, then, if the authorized and the unauthorized parts of the appointment are severable,^(c) the exercise of the power will be effectual as to the authorized part and ineffectual as to the unauthorized.^(d)

- (a) In such a case, if the appointor has given, by the same instrument, benefits out of his own property to those objects of the power who benefit by the appointment, such persons will not be allowed to claim both the benefits under the appointment and the benefits out of the appointor's own property, without compensating the persons deprived of their shares in the appointment by reason of the fact that they are not objects of the power ('Election'). But no election is raised unless there is really a fund of the appointor's own, out of which compensation can be made (*Bristow v. Warde* (1794) 2 Ves. Jr. 336).
- (b) *Alexander v. Alexander* (1755) 2 Ves. Sr., at p. 644, *per* Sir Thomas Clarke, M. R.
Stephens v. Gadsden (1855) 20 Beav. 463.
Gerrard v. Butler (1855) *ibid.* 541.
- (c) This is essential. *Romilly, M. R.*, in the case last cited, admits that if 'the superadded terms constitute an essential part of the gift itself,' the whole appointment will be bad. A good deal will depend on whether the persons intended by the appointor to ben-

effit by the failure of the condition, are objects of the power, or not (*Re Perkins* [1893] 1 Ch. 283).

- (d) *Alexander v. Alexander*, *ubi sup.*
Re Perkins, *ubi sup.*

[*Alexander v. Alexander* has been overruled on another point by *Re Kerr's Trusts* (1877) 4 Ch. D. 600. But the doctrine in the text is not affected.]

1474. Powers of appointment and disposition are *Powers and*
 subject to the Rule against Perpetuities (*post*, Sect. XV, *Perpetuities*
 Tit. III); in the sense that no such power which
 may, according to the terms of the instrument creat-
 ing it, be exercised beyond the period of perpetuity,
 is valid.^(a) But if, by the terms of the instrument
 creating it, the power must be exercised within the
 period, but may be exercised in favour of objects fall-
 ing within the period of perpetuity, and also in fa-
 vour of other objects, an exercise of the power which
 disposes of the whole or a definite and ascertainable
 share of the property in favour of objects wholly
 within the period of perpetuity, will be valid.^(b)

- (a) *Re Norton* [1911] 2 Ch. 27.
Re De Sommers [1912] 2 Ch. 622.

[It will be remembered that, in the case of a 'special' power, this period commences to run from the taking effect of the settle-
 ment, not of the exercise of the power (*ante*, § 1470).]

- (b) *Griffith v. Pownall* [1843] 13 Sim. 393.
Davies' and Kent's Contract [1910] 2 Ch. 35.
Fane v. Fane (1913) 57 Sol. Jo. 321, *per* Cozens-Hardy, M. R.

[An appointment to a class which comprises objects within and
 without the period is bad (*Lerke v. Robinson* (1817) 2 Mer. 363).]

TITLE II—STATUTORY POWERS OF LIMITED OWNERS

*Powers of
'tenant for
life'*

1475. A 'tenant for life,'^(a) or a person having or entitled to exercise the powers of a 'tenant for life,'^(b) as defined in § 1478, has, with regard to 'settled land,' as defined in § 1476, but subject as explained in this Title, the following powers of disposition and management with regard to such land, viz. : —

(a) Settled Land Act, 1882, s. 2 (5).

(b) For the list of such persons, see ss. 58–62 of the S. L. A., 1882, and *post*, § 1480.

- (i) a power to sell or exchange the settled land, or any part thereof, or to sell any chattels (*post*, § 1486) settled therewith, or any easement, right, or privilege of any kind, over or in relation to such land ;

Settled Land Act, 1882, s. 3 (i) (iii) ; s. 37 (1).

- (ii) a power to concur in making partition of any land comprised in the settlement, or held in undivided shares thereunder ;

Ibid., s. 3 (iv).

- (iii) a power to grant leases of the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or

in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding : —

- (a) in case of a building lease, 99 years ;
- (b) in case of a mining lease, 60 years ;
- (c) in case of any other lease, 21 years ;

Settled Land Act, 1882, s. 6.

[Longer terms, or leases in perpetuity, may be authorized by the Court in the case of building or mining leases (*ibid.*, s. 10).]

- (iv) a power to accept, with or without consideration, a surrender of any lease of any settled land, in respect of the whole land leased, or any part thereof, with or without exception of any mines or minerals therein, or in respect of any mines or minerals ;

Ibid., s. 13.

- (v) a power to grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to grant any such lease of the land as above described (§ 1475 (iii)) ;

Ibid., s. 14.

- (vi) a power to cut timber growing on the settled land, ripe and fit for cutting ;

Ibid., s. 35 (2). (*Quære*: whether, under this section, he may cut timber planted as an improvement, despite the provisions of s. 28 (2) ?)

- (vii) a power to make, out of capital moneys subject to the settlement, and in manner

prescribed by the Settled Land Acts, improvements, of a kind authorized by statute, on, or in connection with, and for the benefit of, the settled land ;

Settled Land Act, 1882, s. 25.

- (viii) a power to mortgage the settled land or any part thereof, to raise money for any of the following purposes, viz. : —

(a) enfranchisement,^(a) including the purchase of the reversion to leaseholds^(b) (of any part of the settled land) ;

(a) *Ibid.*, s. 18.

(b) *Re Bruce* [1905] 2 Ch. 372.

[The words in brackets are not in the Act ; but, presumably, are implied.]

(b) equality of exchange or partition ;

Settled Land Act, 1882, s. 18.

(c) payment of any costs, charges, and expenses directed to be paid out of property subject to the settlement ;

Ibid., s. 47. (This power is not confined to the tenant for life, but may be exercised by any person under the direction of the Court.)

(a) discharge of any incumbrance on the settled land or part thereof, other than any annual sum pay-

able only during a life or lives,
or during a term of years absolute or determinable.

Settled Land Act, 1890, s. 11.

[Numerous conditions, as to the form and otherwise under which these various powers must be exercised, are imposed by the Settled Land Acts; but are too lengthy to be set out here. It is to be observed, however, that, generally speaking, a purchaser or other person dealing in good faith with the tenant for life, is to be deemed to have given the best price, consideration, or rent, that could reasonably have been obtained by the tenant for life, and to have complied with all the requisitions of the Acts (S. L. A., 1882, s. 54).]

1476. A 'settlement,' for the purposes of this '*Settlement*' Title, includes any instrument or instruments, whenever executed or made, whereby any land, or any estate or interest in land (including an undivided share), for the time being stands limited by way of succession; and 'settled land' means any interest in land which is the subject of such an instrument or instruments,^(a) including any estate or interest in land which is subject to a trust or direction for sale, and for the application of the proceeds, or the income thereof, or the income of the land until sale, or any part of such proceeds or income, for the benefit of any person for his life or any other limited period, or for the benefit of two or more persons concurrently for any limited period.^(b) But, in the case of land subject to a trust or direction for sale, the powers of the tenant for

life may not be exercised without the leave of the Court.^(c)

(a) S. L. A., 1882, s. 2.

(b) *Ibid.*, s. 63.

(c) S. L. A., 1884, s. 7.

[The fact that such a trust or power can only be exercised at the request or by the direction of a person other than the donee of the trust or power, is immaterial (*Re Wagstaff's S. E.* [1909] 2 Ch. 201). But an actual power in the tenant for life to forbid the sale is fatal (*Re Goodall's Settlement* [1909] 1 Ch. 440). An order under the Act of 1884 puts an end to the powers of persons not authorized by it to execute the trusts or exercise the powers of the settlement (*ibid.*, s. 7 (iv)); but, until it is registered as a *lis pendens*, it does not affect strangers to the settlement (*ibid.*, s. 7 (vi)). Any estate or interest in remainder or reversion not disposed of by the settlement, and reverting to the settlor or descending to the settlor's heir, is for the purposes of the Act an estate or interest in the settled land (S. L. A., 1882, s. 2). 'Succession' in the section clearly includes defeazance (see s. 58 (1) (ii)); and the word has no technical force (*Mundy's and Roper's Contract* [1899] 1 Ch., at p. 290, *per* Chitty, L. J.).]

'Compound
settlement'

1477. Any series of instruments dealing with the same land,^(a) and any group of instruments limiting different lands on the same (or substantially the same) limitations,^(b) will be deemed a settlement for the purposes of the Settled Land Acts; and the 'tenant for life' thereunder will be able to bind all interests arising by way of succession under such series of instruments, and all land comprised in such group of instruments.

(a) *Mundy's and Roper's Contract* [1899] 1 Ch. 275 (since frequently followed).

Re Phillimore [1904] 2 Ch. 460.

- (b) *Re Monson's S. E.* [1898] 1 Ch. 427.
Re Freme [1894] 1 Ch. 1.

[The definition of a 'compound settlement' is far from easy; but the importance of the question is great. Amongst other points, it may affect (i) the power of a tenant for life, as vendor, to give a title against persons having charges under an older deed (*Mundy's and Roper's Contract, ubi sup.*), (ii) the power to redeem a mortgage on Whiteacre out of money provided by the sale of Blackacre (*Re Monson, ubi sup.*), (iii) the question whether a house is a 'principal mansion house' (*Gilbey v. Rush* [1906] 1 Ch., at p. 20, *per* Kekewich, J.), and (iv) the identity of the trustees (S. L. A., 1890, s. 16 (i)). On the other hand, there can be no doubt that several 'settlements' may be contained in a single instrument, *e. g.* a testament.]

1478. A 'tenant for life,' for the purposes of this Title, means any person who is, for the time being, under a settlement as defined in §§ 1476 and 1477, beneficially entitled to the possession^(a) or income of settled land for his life,^(b) or any two or more persons who are jointly or concurrently so entitled; ^(c) whether he or they has or have assigned his or their interests or not,^(d) and whether the income is subject to charges or incumbrances,^(e) or a trust for accumulation,^(f) or not.

(a) S. L. A., 1882, s. 2 (5).

(b) *Ibid.*, s. 2 (10) (i).

Re Bennet [1903] 2 Ch. 136.

(c) S. L. A., 1882, s. 2 (6).

(d) *Ibid.*, s. 50 (1). (A 'tenant for life' who has assigned his interest for value cannot, without the assignee's consent, affect the latter's rights. But, unless the assignee is actually in possession of part of the settled land, the tenant for life may exercise his statutory powers of leasing without the assignee's consent (*ibid.*, s. 50 (3)); and an assignment or charge of or

on the 'tenant for life's' interest in consideration of marriage is not an assignment for value for this purpose (S. L. A., 1890, s. 4).

(e) S. L. A., 1882, s. 2 (7).

Re Pollock [1906] 1 Ch. 146.

(f) *Re Llewellyn* [1911] 1 Ch. 451.

[It is clear that a 'tenant for life' includes persons having only equitable interests. But neither the object of a merely discretionary trust (*Re Atkinson* (1886) 31 Ch. D. 577), nor a person taking in a fiduciary capacity (*Femmett's and Guest's Contract* [1907] 1 Ch. 629), nor a person the commencement of whose interest is actually postponed until the expiry of a trust for accumulation (*Re Strangways* (1885) 34 Ch. D. 423), is a 'tenant for life.']

Minor

1479. A minor who is in his own right seised of or entitled in possession to land is, for the purposes of this Title, deemed to be a tenant for life, and the land settled land.

S. L. A., 1882, s. 59.

[Another example of a fictitious 'settlement' occurs in the case of a tenant by the curtesy, who, though not 'deemed' to be a tenant for life, has the powers of one (s. 58 (viii)). Such a person's estate is deemed to arise under a settlement made by his wife (S. L. A., 1884, s. 8). For the exercise of the powers of an infant 'tenant for life,' see *post*, Sect. VII, Tit. I, § 1504. S. 59 of the Act of 1882 does not apply where the infant is only entitled to the land on the happening of a contingency (*Re Horne* (1888) 39 Ch. D. 84). But it seems that, under the very similar wording of s. 41 of the Conveyancing Act, 1881, where an infant is contingently entitled, the land will be a 'settled estate' for the purposes of the Settled Estates Act, 1877 (*Re Sparrow* [1892] 1 Ch. 412).]

*Persons
having*

1480. The following persons have, when the estate or interest of each of them is in possession,

the powers of a tenant for life as defined in this Title, *powers of*
viz. : — *'tenant for*
life'

- (i) a tenant in tail (in every case except where he is restrained from barring or defeating the estate tail by Act of Parliament, and the land was purchased with moneys provided by Parliament in consideration of public services) ;
- (ii) a tenant in fee simple, with an executory limitation over (*ante*, Sect. I, Tit. VIII, § 1183) ;
- (iii) a person entitled to a base fee (*ante*, Sect. I, Tit. III, § 1058) ;
- (iv) a tenant *pur autre vie* (*ante*, Sect. I, Tit. IV, §§ 1070, 1801-5) and a tenant for years determinable on life, not holding 'merely' under a lease at a rent ;

[The interpretation of the latter part of this clause is not easy. But the restriction is clearly important.]

- (v) a tenant for his own life, or a tenant such as is described in (iv), whose estate is liable to cease in any event during the life of the *cestui que vie*, or is subject to a trust for accumulation ;

[In this subs. there is no restriction such as that applying to (iv).]

- (vi) a tenant in tail after possibility of issue extinct (*ante*, Sect. I, Tit. III, § 1056).
- (vii) a tenant by the curtesy ;

[For the 'tenant by the curtesy,' see *post*, Bk. V (Succession).]

- (viii) a person entitled to the income of land under a trust liable to be determined on sale or bankruptcy or any other event ;

S. L. A., 1882, s. 58 (1) ; s. 63 (1).

- (ix) A married woman entitled for her separate use, whether restrained from anticipation or not, to any interest which, had she been a *feme sole*, would have constituted her a tenant for life, or given her the powers of a tenant for life.

Ibid., s. 61 (2) (6).

[Where she is entitled, but not for her separate use, she and her husband together have the powers of a tenant for life (*ibid.*, s. 61 (3)). For the powers of a dowress, see *post*, § 1495.]

*Statutory
powers in-
alienable*

1481. A tenant for life under this Title cannot assign or release his statutory powers, or contract not to exercise them ; nor do they pass with an assignment, by operation of law or otherwise, of the tenant for life's interest in the land.

Ibid., s. 50.

*Cannot be
excluded*

1482. The settlor cannot, directly or indirectly, limit or prohibit the exercise of the statutory powers of the tenant for life by any provision in the settlement ; but additional or larger powers may be

conferred by the settlement, so far as they are not inconsistent with the statutory powers.

S. L. A., 1882, ss. 51, 56, 57.

[It is expressly provided in the Act (s. 52) that no exercise of the tenant for life's powers shall occasion a forfeiture; and the cases show that any attempt, however indirect, to penalize a tenant for life for exercising his statutory powers, or to induce him to abstain from exercising them, will be held void.]

1483. In exercising his statutory powers, the tenant for life must have regard to the interests of all parties entitled under the settlement; and he is, in relation to such exercise, deemed to be in the position, and to have the duties and liabilities, of a trustee for such parties. *Fiduciary*

Ibid., s. 53.

[It is by reason of this provision that a tenant for life is unable to delegate the exercise of his statutory powers (*Re Wilton's S. E.* [1907] 1 Ch., at p. 55, *per* Warrington, J.); also that any benefit obtained by him by reason of his position will form part of the settled land (*Lloyd-Jones v. Clarke-Lloyd* [1919] 1 Ch. 124).]

1484. Where a tenant for life, or a person having the powers of a tenant for life, is a lunatic so found by inquisition, the committee of his estate may, under an order of the Lord Chancellor or other person having jurisdiction in lunacy, exercise his statutory powers as a tenant for life. *Lunatic tenant for life*

Ibid., s. 62.

[Notwithstanding some doubts, it seems probable that neither the statutory powers (*Re S. S. B.* [1906] 1 Ch. 712), nor the stat-

utory consents (*De Moleyns' and Harris' Contract* [1908] 1 Ch. 110) can be exercised or given by the 'quasi-committee' of a lunatic not so found, or of a person who through infirmity of mind arising from age is incapable of managing his affairs (Lunacy Act, 1890, s. 116); even with the approval of the Court.]

*Consent to
exercise*

1485. The statutory powers of a tenant for life may not be exercised without the consent of the trustees of the settlement or the Court in the following cases, viz.:—

(a) in the cutting of timber (*ante*, § 1475 (vi));

S. L. A., 1882, s. 35 (1).

(b) in selling, exchanging, or leasing the 'principal mansion house' and the pleasure grounds and park and lands (if any) usually occupied therewith;

S. L. A., 1890, s. 10 (2).

[What is a 'principal mansion house' may be a question of difficulty (*Gilbey v. Rush* [1906] 1 Ch. 11); but the Act provides (s. 10 (3)) that a house which is usually occupied as a farm house, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a 'principal mansion house' within the meaning of the section.]

(c) in making improvements out of capital money arising under the Settled Land Acts (*post*, § 1494).

S. L. A., 1882, s. 26 (1).

[It has already been pointed out (§ 1475 (viii) (c)) that the power to mortgage for payment of costs can only be exercised by direction of the Court.]

'Heirlooms'

1486. A tenant for life can, under his statutory powers, sell personal chattels settled on trust so as to

devolve with the settled land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to a freehold of inheritance in the land. But such sale cannot be made without an order of the Court.

S. L. A., 1882, s. 37 (3).

1487. Where the tenant for life wishes to acquire by purchase, exchange, or partition, any part of the settled land, or where it is proposed to purchase from the tenant for life any land to be included in the trusts of the settlement, the statutory powers of the tenant for life are exercised by the trustees of the settlement. *Dealings with tenant for life*

S. L. A., 1890, s. 12.

1488. A tenant for life may enter into a binding contract to do any of the acts which he has statutory power to do, and vary or rescind the same. Such contract will (unless varied or rescinded) enure for the benefit of the settled land, and be enforceable against and by every successor in title for the time being of the tenant for life; and every such successor may rescind or vary the same as the tenant for life might have done,^(a) or may, for the purpose of carrying into effect such contract, grant any lease^(b) or make any *Power to contract*

conveyance^(c) which, if made by such predecessor, would have been binding on his successors in title.

(a) S. L. A., 1882, s. 31.

(b) *Ibid.*, s. 12 (i).

(c) S. L. A., 1890, s. 6.

*Validation
of voidable
leases*

1489. Where, in the intended exercise of any statutory or other lawful power, a lease has been *bonâ fide* granted not in conformity with such power, and the lessee has entered thereunder, such lease will be deemed in equity a contract to grant, at the request of the lessee, his representatives or assigns, a valid lease under such power; and all persons who would have been bound by a valid lease under such power, are bound by such contract, unless they are willing to confirm without variation the lease actually granted. If the estate of the person granting such lease continues until after the time when he could have lawfully granted it, such lease will take effect as if it had been granted at such time.

Leases Act, 1849, ss. 2, 4.

[A simple memorandum, on or before acceptance of rent, by a person entitled to treat the lease as invalid, confirming the lease, will have the effect of a confirmation by such person; and where a reversioner becomes able to confirm an invalid lease, the lessee cannot refuse to accept confirmation (Leases Act, 1850, ss. 2, 3). The Leases Act, 1849, is not confined to 'tenants for life'; but it does not apply to ecclesiastical corporations, colleges, hospitals, or charitable foundations (s. 7).]

1490. A tenant for life, intending to exercise any of his statutory powers, must give one month's notice by registered letter to the trustees of the settlement and their solicitor (if known to the tenant for life). *Notice of intention to exercise powers*

S. L. A., 1882, s. 45.

But:—

- (i) such notice, as regards a sale, exchange, partition, or lease, may be of a general intention;

S. L. A., 1884, s. 5 (1).

- (ii) it is not required in the case of intention to grant a lease for a term not exceeding twenty-one years at the best rent that can reasonably be obtained without fine;

S. L. A., 1890, s. 7 (1).

- (iii) any trustee may, by writing under his hand, waive notice, or may accept less than one month's notice;

S. L. A., 1884, s. 5 (3).

- (iv) a person dealing in good faith with the tenant for life is not concerned to see that such notice has been given.

S. L. A., 1882, s. 45 (3).

1491. For the purposes of the Settled Land Acts, the following persons, in the order named, are deemed alternatively to be trustees of the settlement, viz.: — *Trustees for purposes of the Acts*

- (i) the persons who, under the settlement, are trustees with a general power of sale, or to consent to a sale, or to approve of the exercise of a power of sale of (the) settled land;

S. L. A., 1882, s. 2 (8).

- (ii) the persons declared by the settlement to be trustees for the purposes of the Acts;

Ibid.

- (iii) the persons (if any) for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale;

S. L. A., 1890, s. 16 (i).

- (iv) the persons (if any) for the time being under the settlement similarly empowered or entrusted with regard to a future power or trust for sale, whether the power or trust takes effect in all events, or not;

Ibid., s. 16 (ii).

- (v) the persons appointed by the Court for the purpose.

S. L. A., 1882, s. 38.

[The provisions of the Trustee Act, 1893, as to the appointment of new trustees (see especially ss. 10-12 of that Act) apply to trustees for the purposes of the S. L. Acts (Trustee Act, 1893,

s. 47). Ordinarily, the tenant for life cannot exercise his statutory powers unless there are at least two trustees, (S. L. A., 1882, s. 45 (2)); but this rule does not apply to the granting of the leases specified in § 1490 (ii) (S. L. A., 1890, s. 7 (ii)).]

1492. All capital moneys arising under the Settled Land Acts must be paid to the trustees of the settlement or into Court, at the option of the tenant for life, and be invested or applied by and in the names or under the control of the trustees, in compliance with the provisions of the Acts, according to the direction of the tenant for life, or, in default, according to the discretion of the trustees. *Capital moneys*

S. L. A., 1882, s. 22.

[Such moneys and investments are regarded as land subject to the dispositions of the settlement (*ibid.*, s. 22 (5)).]

1493. Capital moneys arising under the Settled Land Acts are applicable:— *Investment of capital moneys*

(i) in making investments specified in the Trustee Act, 1893, ss. 1-7;

S. L. A., 1882, s. 21 (i).

[The provisions of the Trustee Act are a good deal wider than those of the S. L. Act in this respect. But, presumably, they supersede the latter.]

(ii) in discharge of incumbrances on the inheritance or other the whole estate subject to the settlement;

Ibid., s. 21 (ii).

- (iii) in payment for authorized improvements
(*post*, § 1494);

S. L. A., 1882, s. 21 (iii).

- (iv) in payment for equality of exchange or partition of the settled land;

Ibid., s. 21 (iv).

- (v) in purchase of the seignory of any freehold land, or the fee simple of any copyhold or customary land, being part of the settled land;

Ibid., s. 21 (v).

- (vi) in purchase of the reversion or freehold in fee of any part of the settled land which is held on lease for life or years;

Ibid., s. 21 (vi).

- (vii) in purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the date of the purchase;

Ibid., s. 21 (vii).

but:—

- (a) capital money arising from settled land in England may not (unless the settlement so expressly authorizes) be applied in the purchase of land out of England; and

Ibid., s. 23.

- (b) moneys arising under a settlement by way of trust for sale, may not

be invested in the purchase of land, unless the settlement authorizes such investment.

S. L. A., 1882, s. 63 (2) (ii).

- (viii) in purchase in fee simple, or for a period of sixty years or more, of mines or minerals convenient to be held or worked, or of any easement, right, or privilege convenient to be held, with the settled land;

Ibid., s. 21 (viii).

- (ix) in payment to any person becoming absolutely entitled, or empowered to give an absolute discharge;

Ibid., s. 21 (ix).

- (x) in payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of the Settled Land Acts.

Ibid., s. 21 (x).

1494. A tenant for life desirous of making any of the improvements authorized by statute to be made out of capital moneys arising under the Settled Land Acts,^(a) may submit a scheme for the approval of the trustees or the Court; and, after an approved scheme has been carried out, the trustees or the Court may,

Scheme of improvements

G G

on a certificate of the Board of Agriculture, or of a competent engineer or able practical surveyor approved by the Board or the Court, apply or direct to be applied the whole or any part of such capital moneys in or towards payment therefor.^(b)

- (a) For a list of these, see S. L. A., 1882, s. 25; S. L. A., 1890, s. 13.
 (b) S. L. A., 1882, s. 26.

[The tenant for life and any of his successors may be required by the Board to repair and insure the improvements made out of capital moneys, and to report to the Board on the state thereof; and they may not cut down timber planted as an improvement (*ibid.*, s. 28 (i)–(iii)). On the other hand, the tenant for life and his successors, though limited owners, may with impunity commit many kinds of waste in executing or repairing improvements authorized by the Acts (*ibid.*, s. 29). The Court has now power to authorize the expenditure of capital moneys on improvements made by the tenant for life; even though the latter has not previously submitted a scheme (S. L. A., 1890, s. 15). Later statutes, e. g. the Housing of the Working Classes Act, 1890, s. 74 (1) (b), and the Agricultural Holdings Act, 1908, s. 20, add to the list of improvements which may be made under the Settled Land Acts.]

Leases by
dowress

1495. A dowress, or a husband entitled to the profits of land of which his wife is seised in fee, may make leases of the land (except the principal mansion house and demesne) for any term not exceeding twenty-one years, to take effect within one year from the making thereof.

Settled Estates Act, 1877, s. 46.

[These persons are not 'tenants for life' within the terms of s. 2 (5) of the S. L. A., 1882; because they do not take 'under a settlement.' And, as they are not expressly given the powers of a

tenant for life by s. 58, presumably they can only rely on the Settled Estates Act, 1877. Husbands entitled *jure mariti* must now be rare; for they must not only have been married before 1883, but their wives must have acquired the land before that date. The leases authorized by s. 46 of the Settled Estates Act, 1877, are subject to various conditions.]

1496. A tenant in tail (in possession) may by ordinary deed grant a lease of any part of the entailed land for a period not exceeding twenty-one years, to commence at any time not exceeding twelve months from the date of the lease, at a rent not less than five sixths of a rackrent; and such lease will be binding both on the issue in tail and on the reversioner or remainderman (including the Crown).

*Leases by
tenant in
tail*

Fines and Recoveries Act, 1833, ss. 15, 41.

[The tenant in tail in possession has now much wider powers under the Settled Estates Act, and the Settled Land Acts (*ante*); but the provisions of the Fines and Recoveries Act appear not to have been repealed.]

{ NOTE

Under the powers conferred by numerous statutes, e. g. the Public Money Drainage Acts, 1846-1856, and the Improvement of Land Acts, 1864 and 1899, public and private moneys can be advanced for the purpose of making various classes of improvements of land, and can be charged upon the inheritance by way of terminable rent charge. Proceedings under these Acts are usually initiated by limited owners; but the details are too lengthy to be set out here. It may be mentioned, however, that, by s. 30 of the S. L. A., 1882, all the improvements which, by that Act (and, presumably, by the S. L. A., 1890) are authorized to be made out of capital moneys in the hands of the trustees or the Court, may be made under the alternative machinery of the Improvement of Land Acts.

G G 2

SECTION VII

INCAPACITY TO HOLD AND ALIENATE LAND

TITLE I — MINORS

*Acquisition
and aliena-
tion*

1497. A minor can acquire and alienate land ; but, subject to § 1500, *post*, conveyances of land by and to a minor (other than conveyances by virtue of special custom) ^(a) are voidable by the minor, ^(b) within a reasonable time after he attains his majority, or by his representatives ^(c) within a reasonable time after his decease. ^(d)

(a) The most important of these is the custom by which a minor can convey gavelkind land by feoffment at the age of fifteen (*Maskell's and Goldfinch's Contract* [1895] 2 Ch. 525), a custom obviously referred to in the Real Property Act, 1845, s. 3.

(b) Litt. s. 259.

Co. Litt. 2 b.

Ketsey's Case (1613) Cro. Jac. 320.

Blunden v. Baugh (1632) Cro. Car., at p. 306, *per* Richardson, C. J.

Smith v. Low (1739) 1 Atk. 489.

Zouch v. Parsons (1765) 3 Burr. 1794.

(c) *Whittingham's Case* (1603) 8 Rep. 42 b. (Mere privies in estate have no such right (*ibid.*).)

(d) *Doe v. Smith* (1788) 2 T. R. 436.

Edwards v. Carter [1893] A. C. 360. (This was a covenant rather than a conveyance; but on the question of 'reasonable time' the remarks of the House are general.)

*Powers of
appointment*

1498. A minor cannot (except under § 1500) exercise a power appendant, or (*semble*) a power in

gross, over land ^(a) (*ante*, Sect. VI, Tit. I, § 1463); but a power collateral over land may be irrevocably exercised *inter vivos* by a minor, if it is the apparent intention of the settlor to enable him to do so.^(b)

- (a) *Hearle v. Greenbank* (1749) 3 Atk. 695. (There seems to be no actual authority for powers in gross. But see Sugden, *Powers* (8th ed.) p. 177; Farwell, *Powers* (2nd ed.) p. 125.)
- (b) *King v. Bellord* (1863) 1 H. & M., at p. 347, *per* Wood, V. C., approved in
Re Cardross' Settlement (1878) 7 Ch. D. 728.
Re D'Angibau (1880) 15 Ch. D. 228.

[For the testamentary powers of a minor, see *post*, Bk. V., Sect. I, Tit. I, § 1965. For the exercise of the statutory powers of a minor under the Settled Land Acts, see *post*, § 1504.]

1499. A minor can present to a living of which the advowson is vested in him at law or in equity. *Presentation to living*

- Arthington v. Coverly* (1733) 2 Eq. Ca. Ab. 518.
- Hearle v. Greenbank*, *ubi sup.*, at p. 710, *per* Lord Hardwicke, C.

1500. A male minor of the age of twenty years and a female minor of the age of seventeen years ^(a) may, with the sanction of the Court, upon or in contemplation of his or her marriage,^(b) make a valid settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment.^(c) *Marriage settlement*

- (a) There is some difference of opinion as to whether the statute applies to settlements made after these ages by minors married before (*Re Phillips* (1887) 34 Ch. D. 467; *Re Leigh* (1888) 40 Ch. D., at p. 297, *per* Cotton, L. J.).

(b). The Act has been held to apply to post-nuptial settlements (*Re Sampson and Wall* (1884) 25 Ch. D. 482).

(c) Infants Settlement Act, 1855, ss. 1, 4.

But : —

- (i) a minor cannot, by virtue of the above provision, exercise a power of which it is expressly declared that it is not to be exercised by a minor ;

Ibid., s. 1, *ad fin.*

- (ii) where any power of appointment has been exercised, or any disentailing assurance executed, by a minor tenant in tail, by virtue of the above provision, and such minor dies before attaining majority, such appointment or disentailing assurance thereupon becomes absolutely void.

Ibid., s. 2.

*Grant of
office*

1501. A grant of an office to an infant, in possession or reversion, is valid ; if the infant has sufficient knowledge to execute it when it falls into possession, or if the office is exerciseable by deputy.

Young v. Fowler (1639) Cro. Car. 555.

*Breach of
condition*

1502. A breach of a condition subsequent by a minor occasions a forfeiture of his estate (*ante*, Sect. III, Tit. I, §§ 1360, 1361) ; subject to any power of

relief vested in the Court (*ante*, Sect. III, Tit. I, §§ 1368-1374).

Co. Litt. 246 b, 380 b.

Whittingham's Case (1603) 8 Rep. 42 b.

Slade v. Thompson (1615) 3 Bulstr. 58 (but held no breach).

Young v. Fowler (1639) Cro. Car. 556, *per Curiam*.

Partridge v. Partridge [1894] 1 Ch. 351.

[In *Re Edwards* [1910] 1 Ch., at p. 550, Warrington, J., seems to suggest that Coke is referring to conditions precedent only. *Sed quære*.]

1503. A minor, being lord of a manor, may val- *Manorial*
idly make any grant or accept any surrender of a *powers*
copyhold tenement according to the custom of the
manor, and do any other ministerial act as lord of
such manor in accordance with such custom.

Clark v. Pennifather (1584) 4 Rep., at 23 b.

Swayne's Case (1608) 8 Rep., at 63 b.

Hearle v. Greenbank (1749) 3 Atk., at p. 701, *per* Lord Hardwicke, C.

[It was held, though with some difference of opinion, in *Shoplane v. Roydler* (1605) Cro. Jac. 98, that a grant by the infant's guardian in socage was also good. It was also said by Vaughan, C. J., in *Bedell v. Constable* (1669) Vaugh., at p. 182, that a guardian in socage (and, therefore, now a statutory guardian under the Acts of 1660 and 1886) could grant leases of his ward's land to endure during the ward's minority.]

1504. Where, by reason of the fact that an infant *Statutory*
is seised of or entitled in possession to land, such land *powers*
is settled land (*ante*, Sect. VI, Tit. II, § 1479) for the
purposes of the Settled Land Acts, the trustees of the

settlement will be entitled to exercise the powers of a tenant for life under the Acts.^(a) And where, by reason of an infant being absolutely or contingently entitled to a fee simple or leasehold estate, such estate is a settled estate for the purposes of the Settled Estates Act, 1877, the trustees of the settlement may exercise the powers conferred on trustees by the latter Act.^(b)

(a) Settled Land Act, 1882, s. 60.

(b) Conveyancing Act, 1881, s. 41.

Management of infant's land

1505. Where a person beneficially entitled to the possession of land is an infant, the trustees appointed for the purpose by the settlement, or, if none, the persons under the settlement for the time being trustees with power of sale of the settled land, or of part thereof, or with power to consent to or approve the exercise of such a power of sale, or, if none, any persons appointed as trustees for the purpose by the Court, on the application of a guardian or next friend of the infant, may, subject to the terms of the instrument (if any) under which the interest of the infant arises, enter into and continue in possession of the land; and in every such case the following rules apply:—

- (i) the trustees must manage or superintend the management of the land, with full power to cut timber and underwood in

- the usual course, to erect, repair, and pull down buildings, continue the working of mines and quarries, drain and otherwise improve the land, insure against loss by fire, make arrangements with tenants and others, and accept surrenders of tenancies, but, where the infant is impeachable for waste, without power to commit waste ;
- (ii) the trustees, out of the income of the land, may pay expenses of management, and all outgoings not payable by any other person, and must keep down any annual sum, and the interest of any principal sum, charged on the land. But, where the infant's interest arises under an instrument, this § only applies if that instrument come into operation after the year 1881.

Conveyancing Act, 1881, s. 42 (1) (2) (3) (7) (8).

Conveyancing Act, 1911, s. 14.

[The provisions of s. 42 of the Act of 1881 are applicable when the infant is only entitled to an undivided share (*ibid.* (6)), and also when the infant does not take by settlement, e. g. when he takes by inheritance.]

TITLE II — MARRIED WOMEN

*Acquisition
and aliena-
tion*

1506. A married woman can acquire land in the same manner as a man or a *feme sole*.^(a) If married after 31st December, 1882, as regards all her interests in land,^(b) and, if married on or before that day, as regards all her interests since acquired, she can (subject to any restraint on anticipation (*ante*, Bk. I, § 105)) dispose of them in the same manner as a *feme sole*.^(c) If married on or before that day, she can only (subject to § 1508) dispose of or disclaim, by deed acknowledged, with the concurrence of her husband, under the Fines and Recoveries Act, 1833, interests in land (other than copyholds) acquired, otherwise than to her separate use, on or before that day.^(d)

(a) Married Women's Property Act, 1882, s. 1 (1).

[‘Acquisition’ includes any form of title, whether vested or contingent, and whether in possession, reversion, or remainder (M. W. P. Act, 1882, s. 5). Apparently, copyholds, when there was a custom to that effect, could, even before 1833, be surrendered by a married woman without the formality of a fine or recovery. But in *Johnson v. Clark* [1908] 1 Ch. 303, it was held, by Parker, J., that an alleged burgage custom for a wife to convey without separate examination was (apart from the Act of 1882) void, as ‘unreasonable.’

(b) Married Women's Property Act, 1882, ss. 1, 2; 1893, s. 3.

(c) Married Women's Property Act, 1882, s. 5.

(d) Fines and Recoveries Act, 1833, s. 77.

Real Property Act, 1845, s. 7.

Conveyancing Act, 1881, s. 65 (2) (i).

[It seems that, at the common law, a married woman had no power to disclaim an estate conveyed to her (*ante*, § 1393). By the Real Property Act, 1845, s. 7, she was empowered to disclaim; but only by deed acknowledged, with her husband's consent. Ought not, therefore, such a woman to be entitled to disclaim within a reasonable time after her husband's death? The question may possibly arise with regard to women married before 1883.]

1507. 'Freehold land' may be conveyed by a husband to his wife, and by a wife to her husband, alone, or jointly with another person, by the like means by which it might be conveyed by him or her to another person.

*Conveyances
between
husband and
wife*

Conveyancing Act, 1881, s. 50 (1).

[It will be observed, that this section of the Conveyancing Act does not include a wife's leaseholds, which, during the marriage, could, at common law, be alienated only by the husband. But, since 1882, the power of a wife to convey and acquire leaseholds to and from her husband cannot be doubted; and it seems equally clear, that a husband may surrender copyholds to the use of his wife, and *vice versâ* (*Driver v. Thompson* (1812) 4 Taunt. 294). But a husband, lord of a manor, could not, before the Married Women's Property Act, make a grant of a copyhold to his wife (*ante*, Sect. I, Tit. V, § 1090).]

1508. Even in cases to which the Married Women's Property Acts do not apply, a married woman may exercise, without the concurrence of her husband, any power of appointment, whether coupled with an interest or not; ^(a) unless the settlor has expressly or by implication prohibited such exercise. ^(b) And a married woman may release ^(c) or dis-

*Powers of
appointment*

claim any power; ^(d) except in such a way as to remove a restraint on anticipation.

- (a) *Peacock v. Monk* (1751) 2 Ves. Sen., at p. 191, *per* Lord Hardwicke, C.
Doe v. Eyre (1848) 5 C. B. 713.
Wood v. Wood (1870) L. R. 10 Eq. 220.
- (b) *Morris v. Howes* (1845) 4 Ha. 599 (as to the second coverture).
- (c) Conveyancing Act, 1881, s. 52 (1).
Re Chisbolsm [1901] 2 Ch. 82.
- (d) Conveyancing Act, 1882, s. 6 (1).

Election

1509. A married woman may, without the concurrence of her husband, and whether the Married Women's Property Acts apply, or not, elect between two alternative benefits, so as to bind her land; ^(a) but not so as to release herself from a restraint on anticipation. ^(b)

- (a) *Ardesoife v. Bennett* (1772) 2 Dick. 463.
Barrow v. Barrow (1858) 4 K. & J. 409.
- (b) *Re Vardon's Trusts* (1885) 31 Ch. D. 275.
Haynes v. Foster [1901] 1 Ch. 361.

[The result of the latter restriction sometimes is, that the married woman gets both benefits. It does not, however, apply, if the woman is, in fact, not married when she makes the election (*Re Tongue* [1915] 2 Ch. 283).]

Trust property

1510. A married woman may dispose, or join in disposing, in the same manner as a *feme sole*, and without the concurrence of her husband, of any property which she holds, solely or jointly, as trustee or personal representative.

Married Women's Property Act, 1907, s. 1.

[This provision operates retrospectively to the beginning of 1883, except as to rights acquired between 1882 and 1908 (*ibid.*, s. 1 (2)).]

1511. A married woman, being, either alone or jointly with her husband, protector of a settlement (*ante*, Sect. I, Tit. III, § 1059), may give her consent to the disposition of a tenant in tail, in the same manner as if she were a *feme sole*; ^(a) except that, if she is protector by virtue of an estate which is not her separate property, her consent is not effectual unless her husband joins.^(b) A married woman, being a tenant in tail, may bar the entail,^(c) and, being entitled to a 'long term' (*ante*, Sect. I, Tit. VI, § 1155) may enlarge the same;^(d) notwithstanding that, in either case, she is restrained from anticipation in respect thereof.^(e)

(a) Fines and Recoveries Act, 1833, s. 45.

Married Women's Property Act, 1907, s. 3.

[The last-mentioned enactment is retrospective to 1882.]

(b) Fines and Recoveries Act, 1833, s. 24.

[For the mode of consent, see *ante*, § 1064.]

(c) *Cooper v. Macdonald* (1877) 7 Ch. D. 288.

(d) Conveyancing Act, 1881, s. 65 (2) (i).

(e) Naturally, she must not do so in a way that alienates the fee simple away from herself.

[Whether the married woman can bar the entail or enlarge the term without her husband's consent, or deed acknowledged, depends, of course, on the provisions of § 1506.]

1512. For the purposes of the Copyhold Act, *Copyholds* 1894, a married woman, being lady or tenant of a manor, is deemed to be a *feme sole*.

Copyhold Act, 1894, s. 46.

[For the exercise of statutory powers of married women, being limited owners, see *ante*, Sect. VI, Tit. II, § 1480 (ix). For the purposes of the Agricultural Holdings Act, 1908, if the land is not the separate property of the wife, she must, before acting, be examined apart from her husband by the County Court, or by the Judge of the County Court, for the place where she is, with a view to seeing that she understands the nature and effect of her intended act, and is acting freely and voluntarily (A. H. A., 1908, s. 33).]

TITLE III — CORPORATIONS .

1513. A corporation sole or aggregate may acquire *Mortmain* land; ^(a) but cannot hold it except under a license from the Crown, ^(b) or under the provisions of an Act of Parliament. ^(c) Any assurance of tenements or hereditaments of whatsoever tenure ^(d) to a corporation other than under such license or Act of Parliament, is an unlawful assurance, and works a forfeiture of the land assured, as from the date of such assurance. ^(e)

- (a) Co. Litt. 94 b. (In fact, an ecclesiastical corporation was the only person which could acquire lands in frankalmoign (Litt. s. 133)).
- (b) Formerly the licenses of all the mesne lords were necessary, as well as that of the Crown. But the necessity for the licenses of the mesne lords was abolished by the 7 & 8 Will. III (1695), c. 37.
- (c) These provisions are too numerous to be set out here. They will be found indexed in the current *Chronological Table and Index of Statutes, sub tit.* 'Mortmain (Exemptions).'
- (d) Mortmain and Charitable Uses Act, 1888, s. 10 (iii) (as amended by the Act of 1891, s. 3, which excludes money secured on land, and other personal estate arising from or connected with land, from the operation of the rule of Mortmain).
- (e) *Ibid.*, ss. 1, 2.

[It should be carefully remembered, that the so-called Mortmain and Charitable Uses Act, 1891, in no way (except, possibly, as to money charged on or arising out of land) affected the law with regard to assurances in mortmain.]

1514. *Primâ facie*, such forfeiture accrues to the *Rights of mesne lords* Crown; but the immediate mesne lord may, within twelve months from the date of the unlawful assur-

ance, and any other mesne lord within six months after the right of his next inferior lord expires, enter on and hold the land. If a mesne lord is under any incapacity when his right to enter accrues, such right may be exercised by his guardian or the committee of his estate, or by such other person as the Court may appoint in that behalf.

Mortmain and Charitable Uses Act, 1888, s. 1.

*Saving for
rents*

1515. No forfeiture to the Crown under § 1514 affects any rent or service due in respect of the land to the Crown or any other lord thereof.

Ibid., s. 3.

*Corporation
as joint
tenant*

1516. Subject to § 1513, a corporation may acquire and hold land in joint tenancy with one or more other corporations or individuals; and on the dissolution of the corporation its interest will devolve on the other joint tenant (or tenants).

Bodies Corporate (Joint Tenancy) Act, 1899, s. 1.

*Alienation
by corpora-
tion*

1517. Subject to the provisions of any Act of Parliament, and of its charter or other document of incorporation, a corporation aggregate may alienate

land by conveyance *inter vivos* under its common seal, in the same way as an individual.

Co. Litt. 325 b.

Holland v. Boins (1586) 2 Leon. 121.

Case of Sutton's Hospital (1612) 10 Rep., at 30 b.

Smith v. Barrett (1663) 1 Sid. 162, *per Curiam*.

The Bankers' Case (1695) Skinner, at p. 602, *per Holt*, C. J.

Mayor, &c. of Colchester v. Lowten (1813) 1 V. & B., at p. 244, *per Lord Eldon*, C.

[In the case of public corporations, the consent of some public authority, e. g. the Ecclesiastical Commissioners (for ecclesiastical corporations) or the Local Government Board (for municipal corporations) is almost invariably required; except for the grant of short leases at rack or customary rents. The provisions are so numerous, that it is impossible to set them out here. The position of the corporation sole at common law was probably the same as that of the corporation aggregate; except that the consent of the patron, ordinary, chapter, &c., was required (Co. Litt. 44 a, 325 b). But almost all examples of the corporation sole are public corporations, to whose alienations at the present day the consent of a public authority is usually requisite.]

1518. A university or college, as defined by the Universities and College Estates Act, 1898, may exercise, with the consent of the Board of Agriculture, any of the powers described in Section VI, Title II, *ante*, for the purposes of sale, enfranchisement, exchange, partition, and leasing on building leases with option of purchase, and, without such consent, any other powers of leasing so described. Capital money payable under any transaction which requires the consent of the Board, must be paid to the Board.

*University
and college*

Universities and College Estates Act, 1898, s. 1.

*Sales of
glebe*

1519. Subject to the provisions of the Glebe Lands Act, 1888, the provisions of Section VI, Title II, *ante*, with respect to the sale of land by a tenant for life apply to sales by incumbents under that Act, in like manner as though such incumbent were tenant for life of the land.

Glebe Lands Act, 1888, s. 8 (4).

TITLE IV — CHARITABLE TRUSTS

1520. Subject to any savings and exceptions provided by Act of Parliament, an assurance *inter vivos* of land (including tenements or hereditaments, of whatsoever tenure, but not including money secured on land, or other personal estate arising from or connected with land), and an assurance *inter vivos* of personal estate to be laid out in the purchase of land, to or for the benefit of any charitable use, is void, unless it complies with the following requirements, viz. : —

*Assurance of
land for
charitable
purposes*

- (i) it must take effect in possession for the benefit of the charitable use immediately from the making thereof;
- (ii) it must be without power of revocation, reservation, condition, or provision for the benefit of the assurator of any person claiming under him, other than is provided in § 1521;
- (iii) it must (unless it is of copyhold or customary land or stock in the public funds) be made by deed executed in the presence of two witnesses;
- (iv) it must (unless it is of stock in the public funds, or unless it is made in

good faith for full and valuable consideration) be made at least twelve clear months before the death of the assuror ;

(v) it must, if it is of stock in the public funds (unless it is made in good faith for valuable consideration) be transferred in the public books at least six clear months before the death of the assuror ;

(vi) it must (unless it is of stock in the public funds) be enrolled within six months after its execution in the Central Office of the Supreme Court.

Mortmain and Charitable Uses Act, 1888, s. 4 ; 1891, s. 3.

[There are elaborate provisions in s. 5 of the Act of 1888, to remedy an accidental omission of enrolment.]

Valid reservations

1521. The following and similar provisions, if they reserve the same benefits to persons claiming under the assuror as to the assuror himself, are not deemed to be provisions for the benefit of the assuror within the meaning of § 1520 (ii), viz. : —

- (i) the grant or reservation of a peppercorn or other nominal rent, or of mines or minerals, or of any easement ;
- (ii) covenants or provisions as to buildings, streets, drainage, nuisances, and the like, for the use and enjoyment as well of the

- land assured as of any adjacent or neighbouring land ;
- (iii) a right of entry on non-payment of any such rent or on breach of any such covenant or provision.

Mortmain and Charitable Uses Act, 1888, s. 4 (4).

1522. Any interest in land, or personal estate *Charitable devises* directed to be laid out in the purchase of land, may be assured to or for the benefit of any charitable use by the testament of a person dying after 4th August, 1891.

Mortmain and Charitable Uses Act, 1891, ss. 5, 7, 9.

But, unless the Court or the Charity Commissioners is or are satisfied that the land assured or directed to be purchased is required for actual occupation for the purposes of the charity, the following rules apply : —

Ibid., s. 8.

- (i) The land assured must be sold within one year from the death of the testator, or such extended period as may be determined by the Court or the Commissioners.

Ibid., s. 5.

- (ii) If it is not so sold, the land vests forthwith in the official trustee of charity lands ; and

the Commissioners must take all necessary steps to effect a sale of such land with all reasonable speed.

Mortmain and Charitable Uses Act, 1891, s. 6.

- (iii) Personal estate directed to be laid out in the purchase of land will be held to or for the benefit of the charitable uses, as if there had been no such direction.

Ibid., s. 7.

*Definition of
'charity'*

1523. For the purposes of this Title, a charitable use means a use for the relief of poverty, the advancement of education or religion, or any other purpose deemed to be for the benefit of the community generally; even though restricted to a particular area or class.

Jones v. Williams (1766) 2 Ambl. 651, *per* Lord Northington, C.

Income Tax Commrs. v. Pemsel [1891] A. C. 531.

Re Foveaux [1895] 2 Ch., at p. 504, *per* Chitty, J.

[The question as to what constitutes a purpose 'charitable,' so as to bring it within the policy of the so-called Mortmain Acts, has always been difficult; but it has been rendered more difficult by recent legislation. In practice, the Courts rely substantially on the recital in the preamble of the 43 Eliz. c. 4; though it is admitted that this recital is not exhaustive. The 43 Eliz. c. 4 was repealed by the Mortmain and Charitable Uses Act, 1888, s. 13 (2); with an obscure reservation which appears only to add to the confusion. The conflicting views of eminent authorities may be seen in the report of *Income Tax Commissioners v. Pemsel*, *ubi sup.*]

TITLE V — MISCELLANEOUS

1524. The conveyances by deed of an idiot ^(a) or a lunatic so found ^(b) are void; the conveyances of a person of unsound mind (not being an idiot or a lunatic so found), and of a drunken person, are voidable, subject to the conditions specified in Bk. I, §§ 64, 65, 69, *ante*. The committee or quasi-committee of the estate of a lunatic, or of a person of unsound mind, or any person approved by the judge having jurisdiction in lunacy, may be authorized by the judge to convey the lunatic's land, or to exercise, ^(c) but not to release, ^(d) any power over or in respect of his land.

*Conveyances
of non compos*

- (a) *Beverley's Case* (1603) 4 Rep., at 126 b. (In this case it was said that the conveyance cannot be avoided by the idiot himself or his representatives, but only by the Crown on office found. *Quere*, as to the representatives. But see Littleton, s. 405.)
- (b) *Re Walker* [1905] 1 Ch. 160 (C. A.). The testament of the same lunatic, executed shortly after the deed, and to a similar effect, was afterwards admitted to probate (*Estate of E. V. Walker* [1912] XXVIII T. L. R. 466.)
- (c) Lunacy Act, 1890, ss. 116, 120, 124.

[It seems, however, that the quasi-committee of a lunatic not so found cannot be authorized to exercise the lunatic's statutory powers, or to give statutory consents, under the Land Clauses Consolidation Act, 1845, or the Settled Land Acts (*Re S. S. B.* [1906] 1 Ch. 712; *Re De Moleyns* [1908] 1 Ch. 110).]

- (d) *Re Hirst* [1902] W. N. 177 (followed in *Re Rose* [1904] 2 Ch. 348).

*Land of
convict*

1525. A convict cannot alienate, by act *inter vivos*,^(a) land belonging to him beneficially,^(b) other than land acquired by him while he is lawfully at large under license;^(c) but land belonging to a convict as trustee or mortgagee does not pass to his administrator under the Forfeiture Act, 1870.^(d) Any administrator, in whom property beneficially belonging to the convict is vested, may alienate the same as he shall see fit;^(e) but he cannot effect a disentailing assurance of an estate tail belonging to the convict.^(f)

(a) For the definition of convict, see Forfeiture Act, 1870, s. 6.

The testament of a convict is (probably) valid (*Ex parte Graves* (1881) 19 Ch. D. 1).

(b) Forfeiture Act, 1870, s. 8.

(c) *Ibid.*, s. 30.

(d) Trustee Act, 1893, s. 48.

[It will be observed that this provision does not expressly empower the convict to act as mortgagor or trustee. But, presumably, that is the result, so long as the property is vested in him.]

(e) Forfeiture Act, 1870, s. 12.

(f) *Gaskell's and Walters' Contract* [1906] 2 Ch. 1.

[Probably, however, a disentailing assurance executed by the convict himself will enlarge his estate; though it will not operate to transfer the estate to another person (*ibid.*).]

*Bankrupt's
property*

1526. A trustee in bankruptcy may sell all or any part of the property of the bankrupt vesting in him,^(a) and deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt

with it.^(b) The trustee may also exercise all such powers in, over, or in respect of property as might have been exercised by the bankrupt for his own benefit; ^(c) but not powers vested in the bankrupt as a trustee by statute or otherwise.^(d)

(a) Bankruptcy Act, 1883, s. 54 (2).

[‘The property’ means the property divisible among the creditors (*Ibid.*, s. 44).]

(b) *Ibid.*, s. 20 (1), 56.

(c) *Ibid.*, s. 56 (4). In the opinion of Farwell, L. J., the right to release a limited power does not pass to the trustee; even though such release would increase the bankrupt’s estate (*Re Rose* [1904] 2 Ch. 348). But the order was afterwards discharged by consent, on the ground that all the parties who might be affected by it were not present at the hearing (*Re Rose* [1905] 1 Ch. 94).

(d) e. g. the powers of the bankrupt as limited owner under the Settled Land Acts (*ante*, Sect. VI, Tit. II) remain in the bankrupt (*Re Mansel’s Settled Estates* [1884] W. N. 209, *per* Kay, J.). Probably the consent of the trustee in bankruptcy to the exercise of such powers would not be necessary; though, doubtless, he might apply to the Court to prevent a disastrous or fraudulent exercise of the bankrupt’s powers.

B—CHATTELS CORPOREAL

SECTION VIII

POSSESSION OF CHATTELS CORPOREAL

TITLE I—ACQUISITION AND LOSS OF POSSESSION

Acquisition

1527. Possession of chattels corporeal is acquired by (i) taking, (ii) delivery.

[For the nature of possession of chattels, according to English Law, see the well-known work *Possession in The Common Law* (Clarendon Press, 1888), by Sir Frederick Pollock and the late Sir R. S. Wright. Briefly, any power to control generally the user and location of a chattel, other than the mere physical power exercised by a servant to whom a chattel has been entrusted by his master, is possession for the purposes of English Civil Law (*Charlesworth v. Mills* [1892] A. C., at p. 237, *per* Lord Halsbury, C.). The legal position of the loser of chattels is obscure; but, *semble*, he can bring trespass and, therefore, he retains possession, until he has given up hope of recovering them (*Isaack v. Clark* (1615) 2 Bulstr., at p. 312).]

Taking

1528. The person who assumes effective ^(a) physical control over a chattel corporeal acquires the possession of such chattel; ^(b) whether or not the chattel was at the time in the possession of another person.^(c)

(a) *Young v. Hichens* (1844) 6 Q. B. 606.

ACQUISITION AND LOSS OF POSSESSION 921

- (b) *Armorie v. Delamirie* (1722) 1 Stra. 505.
Bridges v. Hawkesworth (1851) 21 L. J. Q. B. 75.
Charlesworth v. Mills [1892] A. C. 231.
- (c) *R. v. Riley* (1853) 1 Dears. 149.

[Even a thief acquires possession (*Mason v. Lickbarrow* (1790) 1 H. Bl., at p. 360, *per* Lord Loughborough, C. J.).]

1529. A man who has possession of land to which the public have not access ^(a) is deemed to have taken possession of all chattels corporeal on or in the land ; whether he is aware of their existence or not. ^(b) *Chattels on and in land*

- (a) *Bridges v. Hawkesworth* (1851) 21 L. J. Q. B. 75.
- (b) *Elwes v. The Brigg Gas Co.* (1886) 33 Ch. D. 562.
South Staffordshire Water Co. v. Sharman [1896] 2 Q. B. 44.
G. E. R. Co. v. Lord [1909] A. C. 109.

[The first of these last three cases shows that one person may have possession of the surface and another of the sub-soil, for this purpose ; while the third raises very difficult questions between landlord and tenant. Presumably the doctrine of the text extends also to give to the possessor of a movable the possession of its contents (*Cartwright v. Green* (1803) 8 Ves. 406 ; *Merry v. Green* (1841) 7 M. & W. 623).]

1530. Delivery of a chattel corporeal is effected by a release of his control by the former possessor, with the intent that another person shall acquire control, ^(a) followed by an effective taking of control of such chattel by such other person. ^(b) *Delivery*

- (a) *Roth v. Wilson* (1817) 1 B. & Ald. 59.
Moore v. Robinson (1831) 2 B. & Ad. 817.
Dixon v. Yates (1833) 5 B. & Ad. 313.
The Winkfield [1902] P. 42.

(b) *Reddel v. Dobree* (1839) 10 Sim. 244.

Wood v. Tassell (1844) 6 Q. B. 234.

Hilton v. Tucker (1888) 39 Ch. D. 669. (This case, if correctly decided, shows that the "taking" of control on delivery will be presumed where it is clearly feasible.)

[Where several chattels are intended to be disposed of by one transaction, taking control of part by the intended deliverer is, if so intended by both parties, equivalent, for some purposes, to taking possession of the whole (*Slubey v. Heyward* (1795) 2 H. Bl. 504; *Hammond v. Anderson* (1803) 1 B. & P. N. C. 69; *Kemp v. Falk* (1882) L. R. 7 App. Ca., at p. 586, *per* Lord Blackburn). In the Sale of Goods Act, 1893, 'delivery' means, unless the context or subject-matter otherwise requires, the 'voluntary transfer of possession from one person to another' (s. 62 (1)). This definition seems to be quite consistent with that in the text, but does not explain much of the nature of delivery generally.]

*Delivery
order*

1531. Where specific and ascertained goods are in the custody of a wharfinger or warehouseman, as agent for the owner, an order by the latter to the wharfinger or warehouseman, directing him to hold the chattels at the disposal of another person, will, when assented to by the wharfinger or warehouseman, be equivalent to a delivery to such other person by the person giving the order.

Lucas v. Dorrien (1817) 7 Taunt. 278.

Godts v. Rose (1855) 17 C. B., at p. 235, *per* Williams, J.

Pearson v. Dawson (1858) E. B. & E., at p. 456, *per* Lord Campbell, C. J.

[The rule holds, even when the deliveror and the warehouseman are the same person (*Castle v. Sworder* (1861) 6 H. & N. 828). But a mere delivery order has not the effect of changing the possession, until it is assented to by the wharfinger or warehouseman (*McEwan v. Smith* (1849) 2 H. L. C. 309). And, where unas-

ACQUISITION AND LOSS OF POSSESSION 923

certained goods have been the subject of a sale or other transaction, a delivery order does not pass possession until the goods have been weighed or otherwise ascertained (*Hawes v. Watson* (1824) 2 B. & C. 540; *Mordant v. British Oil Mills* [1910] 2 K. B. 502). An indorsement and delivery of a dock warrant issued by a dock company has by custom much the same effect as the giving of a delivery order (*Zwinger v. Samuda* (1817) 7 Taunt. 265).]

1532. Delivery may be effected by handing to and acceptance by the deliverer of a key or other means by which the deliverer may obtain access to the chattels intended to be delivered; but the handing over and acceptance of a mere symbol of ownership or possession will not be a delivery of the chattels symbolized.

*Delivery
longi
manu*

Jones v. Selby (1710) Pre. Cha. 300.

Ward v. Turner (1751) 2 Ves. Sen., at p. 443, *per* Lord Hardwicke, C.

Hilton v. Tucker (1888) 39 Ch. D. 669.

1533. Possession is divested by (i) abandonment, (ii) taking, of a chattel corporeal.

*Loss of
possession*

[In the case of *Peruvian Guano Co. v. Dreyfus* [1892] A. C. 166, certain expressions of some of the learned lords might lead to the conclusion that the mere appointment of a receiver by the Court would of itself divest the possession of the then possessor of the goods. But it appears that, in fact, the goods had been actually delivered to the receiver. (*Ibid.*, at p. 169.)]

1534. Where the control of a chattel corporeal has been intentionally abandoned by its former pos-

Finding

essor, he ceases to have possession of it; and the finder of the chattel who takes it acquires possession of it.

R. v. Glyde (1868) 1 C. C. R., at p. 141, *per* Cockburn, C. J.

[*Semble*: the finder acts at his own risk, so far as civil trespass is concerned (*Merry v. Green* (1841) 7 M. & W. 623). But if he has no reason to believe that the chattel has been accidentally lost, nor any reason for thinking that the loser can be found, he is not guilty of larceny if he appropriates it (*R. v. Glyde, ubi sup.*; *R. v. Knight* (1871) 12 Cox, 102).]

Taking

1535. Taking, lawful or unlawful, by another person of a chattel deprives the former possessor of possession.

Y. B. 21 Edw. IV. [1482] Hil. pl. 6, at fo. 74, *per* Brian, C. J.

Y. B. 4 Hen. VII [1489] Pasch. pl. 1, at fo. 5, *per* Hussey, C. J.

[One of the most common cases of lawful taking is by a sheriff or County Court bailiff under a writ of execution. (*Charlesworth v. Mills* [1892] A. C. 231). Goods seized by a private distrainor are, however, deemed to be in the possession of the distrainee until actually removed from the premises (*Whitley v. Roberts* (1825) McCle. & Yo., at p. 118, *per* Hullock, B.; and it would seem that a sheriff has not possession of goods of the existence of which, though they were on the premises, he was unaware (*Johnson v. Pickering* [1908] 1 K. B. 1).]

Chattels of deceased

1536. The possession of chattels corporeal which were in the possession of a deceased person at the time of his decease is deemed to have vested in his

ACQUISITION AND LOSS OF POSSESSION 925

executor ^(a) or administrator ^(b) at the moment of his decease.

(a) *Fisher v. Young* (1614) 2 Bulstr. 268.

(b) Y. B. 36 Hen. VI (1457) Mich. pl. 4, at fo. 8.
Long v. Hebb (1652) Style, 341, *per* Rolfe, C. J.
Tharpe v. Stallwood (1843) 5 M. & G. 760.

TITLE II — RIGHTS AND LIABILITIES OF POSSESSORS

Rights

1537. The possessor of a chattel corporeal has the following rights, viz. : —

- (i) to defend his possession by force if necessary (except as against a person entitled to deprive him of it), and to retake possession against any one who has wrongfully deprived him of it;

Bk. I, Sect. VI, §§ 176–7, *ante*.

- (ii) to bring actions in the nature of Trespass, Trover, Detinue, and Replevin, against any one wrongly interfering with, or depriving him of, his possession.

Bk. II, Pt. III, Sect. III, Titt. I–III, *ante*.

Liabilities

1538. The possessor of animals or other chattels corporeal is liable for damage caused by such animals or other chattels to the extent specified in §§ 778, 780, 781, 784, 852, *ante*.

Bk. II, Pt. III, Sects. I, II.

[Generally speaking, the mere possessor of chattels is not, as such, liable for damage to other persons caused by them. But of course he may be made liable for intentional or negligent use of them. The nature of the wrong thus committed will depend, according to the classification adopted by the English Law of Torts (*ante*, Bk. II, Pt. III), upon the nature of the damage caused.]

SECTION IX

OWNERSHIP OF CHATTELS CORPOREAL

TITLE I—GENERAL

1539. The user and disposition of chattels corporeal cannot, except in the case of patented articles,^(a) be subjected to any conditions or restrictions, in such a manner as to bind owners generally; ^{*Restrictions on ownership*}^(b) and, in the case of patented articles, such conditions and restrictions are only binding on persons who take with notice of them,^(c) and subject to the provisions of the Patents and Designs Act, 1907.

- (a) *Incandescent Light Co. v. Cantelo* (1895) 12 R. P. C. 262, *per* Willes, J., approved in *National Phonograph Co. v. Menck* [1911] A. C. 336 (P. C.).
- (b) *Taddy v. Sterious* [1904] 1 Ch. 358.
McGruther v. Pitcher [1904] 2 Ch. 306.
- (c) *National Phonograph Co. v. Menck*, *ubi sup.*, at p. 351. (This is contrary to the opinion expressed (*obiter*) by Buckley, J., in *Badische Anilin Fabrik v. Isler* [1906] 1 Ch., at p. 611.)

[The rule in the text only applies to attempts to bind purchasers *in rem*, not to contractual restrictions.]

1540. No successive interests or estates can be created in chattels corporeal; ^{*Successive interests in chattels*}

Re Walker [1908] 2 Ch. 705.

H H

But —

- (i) chattels corporeal (not being consumable goods) may, subject to the Rule against Perpetuities, be vested by deed or testament in trustees upon trust to permit one or more persons to enjoy, simultaneously or successively, the use of them for life or years, with a subsequent trust for the benefit of other persons;

Hoare v. Parker (1788) 2 T. R. 376 (testament).

Lord Scarsdale v. Curzon (1859) 1 J. & H. 40 (deed).

Re Hill [1902] 1 Ch. 807 (testament).

Re Lord Chesham's Settlement [1909] 2 Ch. 329 (deed).

Re Thynne [1911] 1 Ch. 283 (testament).

[The cases stop at a life estate; and any attempt to limit an estate tail in chattels vests the property in the tenant-in-tail absolutely (*Re Lord Chesham's Settlement*, *ubi sup.*, at p. 333, *per* Cozens-Hardy, M. R.). Owing to the fact that there can be no contingent remainder, strictly speaking, in chattels, where personalty is vested in trustees for the benefit of A for life, and, after A's death, for the benefit of the members of a class, the membership of that class will be closed when it becomes necessary to distribute the fund — i. e. generally, when one member of the class attains a vested interest (*Andrews v. Partington* (1791) 3 Bro. C. C. 401). But the rule is only one of construction; and if the settlor has clearly postponed the distribution of the fund (e. g. by a lawful direction to accumulate the income) the class will not be closed until the expiry of the period of postponement (*Re Stephens* [1903] 1 Ch. 322).]

- (ii) such chattels may, subject to the same Rule, be bequeathed directly to one person, with an executory limitation over (*ante*, § 1183) in favour of another;

Jolly v. Wills (1678) 2 Rep. in Cha. 72.

Hyde v. Parratt (1695) 1 P. Wms. 1.

Foley v. Burnell (1783) 1 Bro. C. C. 274.

OWNERSHIP OF CHATTELS CORPOREAL 929

Re Tritton (1889) 69 L. T. 301.

Myers v. Washbrook [1901] 1 Q. B. 360.

[But a very little earlier the contrary had been held (*Warner v. Borsly* (1679) 2 Rep. in Cha. 79).]

- (iii) the possession of chattels corporeal may, by way of hire, loan, deposit, or other bailment (*ante*, Bk. II, Pt. II), be vested in one person, the ownership remaining in another.

[This is, of course, not, strictly, a case of successive, but of concurrent interests.]

1541. An owner of chattels corporeal has in respect of injury to his ownership the remedy described in § 890, *ante*, Bk. II, Pt. III, Tit. IV. *Remedy of owner*

[Of course, if the owner is in possession, he will also have, and will naturally prefer, his possessory remedies.]

1542. Where a chattel of a rare and peculiar value, for the loss of which damages would not be an adequate remedy,^(a) is unlawfully withheld from the person entitled to it, or where any chattel has been withheld from the person entitled to it, by an abuse of fiduciary relationship,^(b) the Court, in the exercise of its equitable jurisdiction, may order the person in whose hands such chattel is, to yield or restore it to the person entitled, on pain of imprisonment. *Specific delivery*

(a) *Pusey v. Pusey* (1684) 1 Vern. 273.

D. of Somerset v. Cookson (1735) 3 P. Wms. 390, and compare *North v. G. N. R.* (1860) 2 Giff., at p. 69.

- (b) *Fells v. Read* (1796) 3 Ves. Jun. 71.
Lowther v. Lowther (1806) 13 Ves. 95.
Wood v. Rowcliffe (1847) 2 Ph. 382.

[Owing to the improvement in the common law remedies for the recovery of chattels (*ante*, Bk. II, Pt. III, Sect. I, Tit. VII, § 810), this branch of equitable jurisdiction is now of less importance than before. But (*semble*) it is still in existence. Like all equitable remedies, it will be given only on equitable terms (*Lodge v. National Union Invest. Co.* [1907] 1 Ch. 300).]

*Liabilities of
owner*

1543. The owner of a chattel corporeal (not being a possessor), other than the owner of a dog under the Dogs Act, 1906, is not liable as such for any damage caused by the chattel.

[Whilst it is difficult to find any positive authority for this statement, the absence of any form of action by which a personal liability could be enforced against an owner of chattels, merely as such, is almost conclusive negative authority. Liabilities in respect of cattle, wild animals, and dangerous substances (*ante*, Book II, Pt. III, Sect. I, Tit. V, §§ 778-785, 852) are liabilities attached to 'keeping' or possession; and it may well be doubted whether even the Dogs Act, 1906, though it employs the term 'owner,' does not really mean 'possessor.' Many liabilities in respect of chattels may arise out of contract (e. g. liability to a carrier for inflammable or explosive goods, *ante*, § 579), and some out of tort (e. g. negligence in handling goods or putting them into circulation, *ante*, § 731 (ii) (iv)); but in these the question of ownership is quite immaterial. The owner of animals may, however, be made indirectly to suffer for damage done by them, through the remedy of distress *damage feasant* (*ante*, Bk. I, Sect. VI, § 180).]

*Prohibition
against
alienation*

1544. Any prohibition against alienation attached to the gift of chattels corporeal, other than a restriction affecting a life interest (*ante*, Sect. I, Tit. IV, § 1079)

or the interest of a married woman (*ante*, Bk. I, §§ 105–108), is void.

Bradley v. Peixoto (1797) 3 Ves. 324.

Corbett v. Corbett (1888) 14 P. D. 7.

Dugdale v. Dugdale (1888) 38 Ch. D. 176.

[The power of the Court to remove the ‘restraint on anticipation’ in the interests of the married woman, is now regulated by the Conveyancing Act, 1911, s. 7, which repeals s. 39 of the Act of 1881.]

1545. Any attempt, by the transferor of a chattel corporeal, to provide for the devolution of the chattel after the death intestate of the transferee to whom an absolute interest in such chattel has been transferred, is void. *Provision for devolution*

Holmes v. Godson (1856) 8 D. M. & G. 152.

Re Dixon [1903] 2 Ch. 458.

TITLE II — SPECIAL KINDS OF OWNERSHIP

Franchise

1546. The person in whom a franchise of treasure trove, waif, stray, wreck, free fishery, royal fish, or free warren (*ante*, Sect. I, Tit. IX, §§ 1224-1235) is vested, has such a property in the chattels being the subject of such franchises, as will enable him to recover such chattels or their value, by seizure or action, from any person unlawfully attempting to convert them to his own use.

Y. B. 21 Hen. VIII (1529) Mich. pl. 2, fo. 9.

Sutton v. Moody (1697) 1 Ld. Raym. 250, *per* Holt, C. J.

Biddulph v. Ather (1755) 2 Wils. 23.

Bailiffs of Dunwich v. Sterry (1831) 1 B. & Ad. 831.

Blades v. Higgs (1865) 11 H. L. C., at p. 633, *per* Lord Westbury, C.

Game

1547. The person who is entitled *ratione soli* to kill the game on a particular area has a similar property in such game, if it is captured or killed within such area, but not otherwise.

Sutton v. Moody (1697) 1 Ld. Raym. 250.

Cburchward v. Studdy (1811) 14 East, 249.

Lonsdale v. Rigg (1857) 1 H. & N. 923.

Blades v. Higgs (1865) 11 H. L. C. 621.

Equitable ownership of chattels

1548. Chattels corporeal may be the subject of equitable ownership; and such equitable ownership will be protected in the same manner, and subject to

the same limitations, as legal ownership, except that it will not be protected against a *bonâ fide* purchaser for value who has obtained the legal ownership in the same chattels.

Joseph v. Lyons (1884) 15 Q. B. D. 280.

Hallas v. Robinson (1885) *ibid.*, 288.

[There have been very few decisions on the nature of equitable ownership of chattels corporeal; but, probably, the same principles as those regulating equitable interests in land (*ante*, Sect. I, Tit. XI, §§ 1313-1321) would apply. It should be remembered, however, that even legal ownership (and, therefore, *a fortiori*, equitable ownership) of chattels corporeal¹ may be defenceless against risks which do not affect interests in land, e. g. 'apparent possession' of a bankrupt, sale in market overt, &c. These risks have been, or will be, duly noted in their proper places. It is also very doubtful whether the equitable doctrines of constructive and imputed notice of equitable interest (*ante*, Sect. I, Tit. XI, § 1316) have any application to chattels corporeal. Certainly the doctrine of constructive notice has not, when these chattels have been made the subject of a commercial transaction (*Manchester Trust v. Furness* [1895] 2 Q. B., at p. 545, *per* Lindley, L. J.; *Lloyds' Bank v. Swiss Bankverein* (1913) 108 L. T. 143). Of course, the Statute of Uses has no application to chattels (*Hinson v. Burridge* (1594) Moo. 701).]

1549. (*Semble*) Personal ornaments and articles *Paraphernalia* of wearing apparel given by a husband to his wife, not for her separate use,^(a) but in order to maintain the credit of his establishment, cannot be alienated by the wife 'during the marriage,'^(b) and remain liable to satisfy the husband's debts during his lifetime and after his decease.^(c) But, if the husband does not alienate them during his lifetime, he cannot deprive his wife of them by

testament, nor do they pass to his personal representatives after his decease.^(d)

- (a) *Tasker v. Tasker* [1895] P. 1.
- (b) *Graham v. Londonderry* (1746) 3 Atk. 393.
- (c) But not until all other assets, including land and specific legacies, have been exhausted (*Tynt v. Tynt* (1729) 2 P. Wms. 542).
- (d) *Hastings v. Douglas* (1632) Cro. Car. 343. (In this case the Court allowed a bequest by the husband; but admitted that, had he died intestate, the chattels would have gone to the widow.)
Tipping v. Tipping (1721) 1 P. Wms. 729.
Seymore v. Tresilian (1737) 3 Atk. 358, *per* Lord Hardwicke, C.

[Since the passing of the Married Women's Property Act, 1882, it has been admittedly more difficult than before to establish a case of paraphernalia; and though, in *Tasker v. Tasker*, *ubi sup.*, Jeune, P., expressed the opinion that the Act had not affected the principles of the subject, this *dictum* was severely criticized by the Court of Appeal in *Masson v. De Fries* 1909] 2 K. B. 831, Farwell, L. J., stating (p. 833) that 'since the Married Women's Property Act, 1882, there can be no question of paraphernalia.' The same learned judge, however, in his judgment (p. 839) admits that chattels may in fact be given by a husband to his wife on terms which correspond with the old position of paraphernalia. It is, of course, necessary to distinguish paraphernalia, not only from chattels which are the separate property of the wife, but from ordinary articles of domestic furniture, and from settled chattels (*ante*, § 1486), which the wife is permitted to use, but in which she has no legal interest.]

Heirlooms

1550. Chattels which by special custom are held along with the tenure of a freehold estate of inheritance cannot be severed by testament from such estate, but pass beneficially to the heir (? or devisee) along with the estate.

Co. Litt. 185 b.

Corven's Case (n. d.) 12 Rep. 105.

Hill v. Hill [1897] 1 Q. B., at pp. 494, 495, *per* Chitty, L. J.

[The heir may bring Trover for the heirloom (*Pusey v. Pusey* (1684) 1 Vern. 273, *per* North, L. K.). In ordinary language, the

term 'heirloom' is used to describe chattels settled to follow so far as possible the devolution of the land (*ante*, § 1486). But these have not the peculiar legal character of heirlooms, e. g. they are pure personalty, and vest absolutely in the first taker of an estate of inheritance in the land who attains twenty-one.]

NOTE ON EQUITABLE RIGHTS GENERALLY

It seems desirable, regard being had to the manner in which equitable principles have been introduced into English law, to state here conspicuously that, despite the provisions of the Judicature Acts, all equitable rights, whether in the nature of property or merely equitable claims to relief against transactions vitiated by undue influence, mistake, or other equitable defect (*ante*, Bk. I, §§ 81-9) or to equitable remedies such as specific performance (*ante*, Bk. I, Pt. I, §§ 286-292) are subject to two important conditions, viz., (i) that they can only be enforced in the discretion of the Court and on terms which the Court thinks fair, (ii) that they can never be enforced against *bonâ fide* acquirers for value of the legal title, who had no notice of the equitable right or claim when they gave their value. If this last condition seems strange in the face of the well-known provision of the Judicature Act, 1873 (s. 25 (11)), that 'where there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail,' the explanation is, that the rules of equity themselves always did recognize the unimpeachable position of the purchaser for value of the legal title, acquired without notice of equitable claims. In fact, the Judicature Acts, though fusing tribunals, have not by any means fused law and equity.

SECTION X
ACQUISITION OF OWNERSHIP OF CHATTELS
CORPOREAL

TITLE I—ABSOLUTE ACQUISITION

Acquisition **1551.** Ownership of chattels corporeal may be acquired absolutely by (i) capture or taking, (ii) production, (iii) delivery, (iv) deed, (v) transfer of bill of lading, (vi) sale.

Appropriation **1552.** Chattels which have been abandoned by their former owner without passing into the possession of other persons,^(a) goods belonging to an alien enemy,^(b) animals *feræ naturæ*, and other *res nullius* become (subject to §§ 1546 and 1547, *ante*, and to the rights of the Crown) the property of any person who appropriates them with the intention of acquiring them for his own benefit.

(a) Blackstone, *Comm.* II, 9.

[Presumably, the onus of proving abandonment, if the former owner put in a claim, would be on the taker or finder. But the finder of an apparently ownerless chattel is entitled to it, by virtue of his possession, as against all persons other than the owner (*Armorie v. Delamirie* (1722) 1 Str. 505; *Bridges v. Hawkesworth* (1851) 21 L. J. Q. B. 75); unless he is an employee who has

found the article on his employer's land while engaged in the work of his employer (*S. Staff. Water Co. v. Sharman* [1896] 2 K. B. 44). It should be carefully noted that 'abandonment,' for purposes of this §, means abandonment of ownership as well as possession.]

- (b) Y. B. 7 Edw. IV, Tr. (1467) pl. 5, fo. 14.
Radley v. Eglesfield (1671) 1 Ventr. 174. (But in order to change the property in a ship, it must be brought into a port of the captor's country (*Anon.* (1641) March, 188-9).)

[The right to appropriate goods belonging to an alien enemy, though it may exist in theory, is, so far as the armed forces of the Crown are concerned, practically abolished by the Army Prize Money Act, 1832, and the Naval Prize Act, 1864. And the subject of an enemy state who resides in this country under license from the Crown, is not an alien enemy for this purpose.]

1553. The offspring of animals is the property of *Young of animals* the owner of the female parent; except in the case of swans, where the offspring belong equally to the owners of both parents.

Prior of Huley's Case, Y. B. 18 Edw. III, Mich. (1344) pl. 55, fo. 48.
 Y. B. 12 Edw. IV, Pasch. (1472) pl. 10, fo. 5.
Case of Swans (1592) 7 Rep. at 17 a.

[Apparently the Roman doctrine of *specificatio*, though stated as part of English law by text-book writers, has not been judicially accepted (Y. B. 5 Hen. VII, Tr. (1490) pl. 6, fo. 15; *Anon.* (1560) Moo. 19). But there are *dicta* in the older case to the effect that if the character of a stranger's material has been wholly changed, the stranger cannot retake it. There are also *dicta* to the effect that, if A mingles his chattels with B's, in such a way that they cannot be distinguished, A loses his property (*Ward v. Eyre* (1615) 2 Bulstr. 323).]

1554. Any delivery of chattels corporeal (*ante, Delivery* Sect. VIII, Tit. I, § 1530) by an owner or person

entitled to dispose of the ownership thereof, with intent to pass the ownership, will confer ownership on the deliverer.^(a) Delivery of current money of the realm (including bank notes) as such, to a person who takes it *bonâ fide* and for valuable consideration, vests the property in the taker; whether the deliveror had any title thereto, or right to deal with the same, or not.^(b)

(a) *Bridget Clark's Case* (1588) 2 Leon. 30, 89.

[This decision is interesting as showing that it is immaterial that the delivery is made for a special purpose. It was said by Doddridge, J., in *Wiseman v. Denham* (1623) Godb. 330, that mere tender of 'a thing which the party ought to have' changes the property. But the Court was divided in opinion whether a good tender had been pleaded.]

(b) *Miller v. Race* (1758) 1 Burr. 452.

Clarke v. Shee (1774) 1 Cowp., at p. 200, *per* Lord Mansfield, C. J.

[If, however, the coins or notes in question were not passed away as money, but as specific articles, the rule does not apply (*Moss v. Hancock* [1899] 2 Q. B. 111).]

*Loan for
consumption*

1555. The ownership of chattels corporeal which are the subject of a loan for consumption passes to the borrower on the delivery of the chattels to him.

Doctor and Student, II, 38.

Grounds and Maxims (Noy) 91.

Essay on Bailments (Sir W. Jones) 65.

[It is as curious as it is suggestive, that not a single case of a loan for consumption (other than a loan of money, as to which see Bk. II, Pt. II, Sect. III, Tit. II, *ante*), appears in the ordinary Reports; though, possibly, a careful search of the Year Books would reveal such cases. For it seems impossible to doubt that, for example, if A lends B a motor tyre on an emergency, he can recover a similar article or its value from B by some form of action.]

1556. Gift or exchange of a chattel corporeal, *Gift without possession* without delivery or deed, is not effectual to pass the ownership; ^(a) unless the chattel is already in the possession of the intended donee. ^(b)

- (a) *Irons v. Smallpiece* (1819) 2 B. & Ald. 551.
Cochrane v. Moore (1890) 25 Q. B. D. 57 (overruling *Danby v. Tucker* (1883) 31 W. R. 578, and *Re Ridgway* (1885) 15 Q. B. D. 447).

[The rule is the same in *donationes mortis causa* (*post*, Bk. V). See *Bunn v. Markham* (1816) 2 Marsh. 532, approved in *Irons v. Smallpiece*, *ubi sup.*]

- (b) *Cain v. Moon* [1896] 2 Q. B. 283.
Re Weston [1902] 1 Ch. 680.
Rawlinson v. Mort (1905) 93 L. T. 555.

[The first two of these were cases of *donatio mortis causa*. But it was assumed in both that the rule applied also to gifts *inter vivos*.]

1557. Ownership of a chattel corporeal may be *Deed* transferred (subject to the Bills of Sale Act, 1878) by a deed expressing an unequivocal intention to that effect, without delivery of the chattel, and without valuable consideration. Acceptance of such ownership on the part of the intended transferee will be presumed; unless there is evidence of disclaimer by him.

- Y. B. 7 Edw. IV (1467) Mich. pl. 21, fo. 20.
Butler's and Baker's Case (1591) 3 Rep., at 26 b.
Siggers v. Evans (1855) 5 E. & B. 367.
Standing v. Bowring (1885) 31 Ch. D. 282. (This was a case of stock; but the general rule was affirmed.)
Cochrane v. Moore (1890) 25 Q. B. D., at pp. 67, 68, *per* Fry, L. J.

[One result of the rule stated in this § is, that a donor cannot revoke a gift by deed, even though there is no acceptance or delivery; if the donee was intended to take any beneficial interest under it.

It is otherwise if the donee is a mere mandatory to carry out the intentions of the donor (*Siggers v. Evans*, *ubi sup.*). It appears by *Flory v. Denny* (1852) 7 Exch. 581, that the ownership of chattels may be transferred by writing not under seal, or even by word of mouth, for value. *Quære*: is this anything more than a sale? Such a document would now clearly fall within the provisions of the Bills of Sale Act, 1878.]

*Future-
acquired
chattels*

1558. A purported assignment of chattels corporeal of which the assignor is not owner, and over which he has no present power of disposition, does not convey the legal ownership of such chattels; even if the assignor subsequently acquires the ownership or power to dispose of them.^(a) But an assignment, if made for valuable consideration, of such chattels^(b) will be treated as a contract to assign, and, if such as the Court will enforce specifically (*ante*, Bk. II, Pt. II, Sect. III, Tit. II, §§ 286–292) will pass the equitable ownership of such chattels to the assignee, so soon as the assignor acquires such ownership or power.^(c)

(a) *Lunn v. Thornton* (1845) 15 M. & W. 379.

Holroyd v. Marshall (1862) 10 H. L. C., at p. 211, *per* Lord Westbury, C.

(b) There was at one time a doctrine that the assignor must have a 'potential' interest in the after-acquired chattels (*Grantham v. Hawley* (1615) Hob. 132). But this doctrine appears to have been overruled by *Tailby v. The Official Receiver* (1888) L. R. 13 App. Ca. 523.

(c) *Langton v. Horton* (1842) 1 Ha. 549.

Petch v. Tutin (1846) 15 M. & W. 110.

Holroyd v. Marshall, *ubi sup.*

Collyer v. Isaacs (1881) 19 Ch. D. 342.

[As in the case of equitable interests in land, this equitable ownership will not be enforceable against a purchaser for value of

the legal ownership in the chattels without notice of the equity (*Joseph v. Lyons* (1884) 15 Q. B. D. 280; *Hallas v. Robinson* (1884) *ibid.*, 288). *Semble*, however, subject to this qualification, a mere *spes successionis* may now be assigned (*Re Lind* [1915] 2 Ch. 345).]

1559. Subject to § 1560, an assignment by deed *Absolute bill of sale* of chattels which remain in the possession of the assignor will be void against the trustee in bankruptcy of the assignor, and against execution creditors of the assignor; unless it complies with the requirements of s. 8 of the Bills of Sale Act, 1878.

Bills of Sale Act, 1878, s. 8.

[The requirements of the section are (1) attestation by a solicitor stating that the effect has been explained by him to the assignor, (2) registration within seven days of execution (there is a provision in s. 9 against evasion of the Act by the execution of a succession of assignments within successive periods of seven days), (3) statement of the consideration for which the assignment was given. It should be noted that by the defining section (s. 4) of the Act, the term 'bill of sale' includes many documents which would not, apparently, pass the ownership in the goods at all; and it would seem that the existence of unregistered documents of such kind is not fatal to a transaction, unless it is necessary to rely upon them in proof of title (*M. S. & L. Ry. Co. v. North Central Wagon Co.* (1888) L. R. 13 App. Ca. 554; *Charlesworth v. Mills* [1892] A. C. 231). An absolute assignment which does not comply with the requirements of the Act of 1878, may, nevertheless, be valid as between the parties (*Tuck v. Southern Bank* (1889) 42 Ch. D. 471). But, subject to this reservation, absolute assignments take effect in order of registration, not of date (Bills of Sale Act, 1878, s. 10, *ad fin.*). It was laid down generally in *Re Standard Manufacturing Co.* [1891] 1 Ch. 627, that corporations, at any rate limited companies within the Companies Acts, are not within the provisions of the Bills of Sale Act, 1878. But it is right to point out that the judgment of the Court dealt mainly, if not entirely, with securities, and especially debenture securities.]

*Exempted
transactions*

1560. The provisions of the Bills of Sale Act, 1878, do not apply to assignments for the benefit of the creditors of the assignor, marriage settlements, transfers of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or other documents of title used in the ordinary course of business for the transfer of goods.

Bills of Sale Act, 1878, s. 4.

*Transfers of
shares in
ships*

1561. The ownership of a registered British ship or of any share therein can only be transferred by an attested bill of sale, containing the particulars required by the Merchant Shipping Acts, and registered at the ship's port of registry.

Merchant Shipping Act, 1894, ss. 24-26.

[Changes of ownership arising from marriage, death, bankruptcy, or causes other than voluntary transfer must also be registered (ss. 27-29); and no equitable interest or any notice of trust may be registered. But equitable interests in ships may be enforced personally against the legal owners in the same way as other equitable interests in personalty (ss. 56, 57). Certain small vessels engaged in coasting and river service are exempt from registration (s. 3).]

*Bills of
lading*

1562. An owner or person entitled to dispose of the ownership of goods ^(a) in course of transit by sea,

or awaiting delivery in the hands of the shipowner after such transit,^(b) may pass the ownership therein by indorsement and delivery to another person of a bill of lading^(c) of such goods, or, if the bill of lading is indorsed in blank, by delivery only of such bill.^(d) Such delivery, if made for valuable consideration, will be effectual against the right of stoppage *in transitu* of an unpaid vendor of the goods.^(e)

- (a) The holder of a bill of lading is not in the position of the holder of a bill of exchange. 'The transfer of the document of title . . . has no greater effect at common law than the transfer of the actual possession' (*Cole v. N. W. Bank* (1875) L. R. 10 C. P., at p. 363, *per* Blackburn, J.).
- (b) *Meyerstein v. Barber* (1866) L. R. 2 C. P. 38.
- (c) (*Semble*) a bill which makes the goods deliverable only to the consignee cannot be transferred at law by indorsement or delivery (*Henderson v. Comptoir d'Escompte* (1872) L. R. 5 P. C. 253). But it would seem that delivery of it would pass an equitable title.
- (d) *Lickbarrow v. Mason* (1787) 2 T. R. 63, ultimately confirmed on appeal.
Meyerstein v. Barber, *ubi sup.*, at p. 45, *per* Erle, C. J.
Sanders v. Maclean (1883) 11 Q. B. D., at p. 341, *per* Bowen, L. J.
- (e) *Lickbarrow v. Mason*, *ubi sup.*

1563. The consignee of goods named in a bill of lading, and every indorsee thereof to whom the property in the goods mentioned in the bill passes by reason of the consignment or indorsement, acquires all rights, and is subject to all liabilities, in respect of such goods, as if the contract contained in the bill had been made with himself.^(a) Every bill of lading, in the hands of a consignee or indorsee for value, is conclusive evidence, against the person

Effect of transfer

signing the bill, of the shipment and condition of such goods.^(b)

(a) Bills of Lading Act, 1855, s. 1.

[It should be noted that this section only applies where the property in the goods passes. It is clear from the Factors Act, 1889, s. 3, that a mere pledge of the goods covered by a bill of lading may be effected by dealing with the bill; and the difficulty of deciding whether a dealing does or does not pass the property is illustrated by the leading case of *Sewell v. Burdick* (1884) L. R. 10 App. Ca. 74 (*post*, Tit. II, § 1581). The § only applies to the actual holder of the bill; *e. g.* the consignee or an indorsee who indorses over before the arrival of the cargo loses both his rights and liabilities under the bill (*Smurthwaite v. Wilkins* (1862) 31 L. J. C. P. 214).]

(b) *Ibid.*, s. 3.

Compania Naviera v. Churchhill [1906] 1 K. B. 237.

Martineaus v. R. M. S. Co. (1912) 106 L. T. 638.

Sale of goods **1564.** A sale of specific or ascertained goods by an owner or person entitled to dispose of the ownership in such goods vests the ownership in the buyer at such time as the parties intend it to be vested.

Sale of Goods Act, 1893, s. 17.

[The term 'goods' in the Act is practically equivalent to 'chattels corporeal'; except that it does not include money (s. 62).]

When property passes without delivery

1565. In the absence of evidence of a different intention, where there is an unconditional contract for the sale of specific goods, in a deliverable state, the ownership of the goods passes to the buyer at the time when the contract is made. If the seller is

bound to do some act to or in reference to the goods, for the purpose of putting them in a deliverable state or ascertaining the price, the ownership does not pass until such act has been done, and the buyer has notice thereof.

Sale of Goods Act, 1893, s. 18, rules 1-3.

[‘Deliverable state’ means a state in which the buyer would, under the contract of sale, be bound to accept the goods (*ibid.*, s. 62).]

1566. Where goods are delivered to the buyer ‘on approval’ or ‘on sale or return,’ or other similar terms, the ownership passes to the buyer when he (*a*) signifies his approval or acceptance to the seller, or does any other act adopting the transaction, or (*b*) without giving notice of rejection, retains the goods after the time fixed by the contract, or if no time has been fixed, after the expiry of a reasonable time. *Sale on approval*

Ibid., s. 18, rule 4.

[What is a ‘reasonable time’ is a question of fact.]

1567. On a contract for sale of unascertained or future goods by description, the ownership passes to the buyer when either he with the seller’s assent, or the seller with his assent, has unconditionally appropriated to the contract goods of that description in a deliverable state. Such assent may be express or implied; and may be given before or after appropriation. *Sale of future goods*

tion. A delivery by the seller to a carrier or other bailee, for transmission to the buyer, without reservation of a right of disposal, is deemed to be an unconditional appropriation of the goods to the contract.

Sale of Goods Act, 1893, s. 18.

[For the law on the subject of the contract of sale of goods, see *ante*, Bk. II, Pt. II, Sect. I, Tit. I.]

*Market
overt*

1568. A sale in market overt of goods there present,^(a) of the kind for which the market is held,^(b) to a *bonâ fide* purchaser, vests the property in such goods in the purchaser, even though the vendor had no title to the goods;^(c) subject, in the case of stolen goods, to a claim by the former owner under a writ of restitution or otherwise, on a successful prosecution of the thief.^(d) For the purposes of this §, 'market overt' means a market (*ante*, Sect. I, Tit. IX, §§ 1215-1219) or any other place enjoying a special privilege to that effect for the sale of such goods at the time of the sale, and, by the custom of London, any open shop within the limits of the City during business hours, in respect of goods usually exposed there for sale.^(e)

(a) A sale by sample will not do; unless the bulk is also exposed in the market (*Crane v. London Dock Co.* (1864) 5 B. & S. 313).

(b) *Case of Market Overt* (1596) 5 Rep. 83 a.

(c) Sale of Goods Act, 1893, s. 22.

[In the case of horses, the protection is not obtained unless the formalities prescribed by the 31 Eliz. (1588) c. 12, have been ob-

served (*Moran v. Pitt* (1873) 42 L. J. Q. B. 47). And a sale in market overt does not bind the Crown (2 Inst. 713).]

- (d) Sale of Goods Act, 1893, s. 24.
Scattergood v. Sylvester (1850) 15 Q. B. 506.
- (e) *Case of Market Overt*, *ubi sup.*
Clifton v. Chancellor (1600) Moo. 624.
Lyons v. De Pass (1840) 11 A. & E. 326.
Clayton v. Le Roy [1911] 2 K. B. 1031.

[It is very doubtful whether the privilege covers a sale to the stallholder or shopkeeper (*Hargreave v. Spink* [1892] 1 Q. B. 25).]

1569. (*Semble*) The ownership of chattels corporeal is not acquired by long possession; even though the action of the owner against the possessor for the time being is barred by lapse of time. *Long possession*

- Putt v. Roster* (1682) 2 Mod., at p. 319, *per Curiam*.
- Miller v. Dell* [1891] 1 Q. B., at p. 471, *per Lord Esher*, M. R.
- London and Midland Bank v. Mitchell* [1899] 2 Ch., at p. 166, *per Stirling, J.* (choses in action).

1570. The rules, hereinbefore stated (Sect. VII, Titt. III and IV), restricting or prohibiting disposition of land in mortmain and for charitable trusts, have no application to chattels corporeal. Subject to this exception, and to the rules affecting the creation of successive interests in such chattels (*ante*, Sect. IX, Tit. I, § 1540), the law affecting the creation and exercise of powers of appointment and disposition of chattels corporeal is the same as the law affecting powers *Appointment of chattels corporeal*

of appointment and disposition of land (*ante*, Sect. VI, Tit. I).

[It is, again (see *ante*, § 1462) even more difficult, in the case of pure personalty, than in that of land, to point to a definite authority which requires the creation of powers to be by deed, or even by writing; for section 7 of the Statute of Frauds only applies to land. But, in practice, such powers are invariably created by deed or testament.]

TITLE II—ACQUISITION BY WAY OF SECURITY

1571. Chattels corporeal may be made a security for the payment of money by (i) mortgage, (ii) pledge, (iii) lien. *Chattels as securities*

1572. Subject to the Bills of Sale Acts, 1878 and 1882, a mortgage of chattels corporeal may be effected by any means by which an absolute transfer of ownership of such chattels may be made (*ante*, Tit. I); provided that there is an intention to pass the ownership of the chattels by way of security for the payment of money. In such a case, the transferor or his successor in title will be able to redeem the chattels on payment of the amount secured, with interest, and costs, if any. *Mortgage of chattels*

Ryall v. Rolle (1749) 1 Atk. 165.

Reeves v. Capper (1838) 5 Bing. N. C. 136.

Meyerstein v. Barber (1866) L. R. 2 C. P., at p. 51, *per* Willes, J.

Reeves v. Barlow (1884) 12 Q. B. D. 436.

Ex parte Hubbard (1886) 17 Q. B. D., at p. 696, *per* Lord Esher, M. R.

Re Morritt (1886) 18 Q. B. D., at pp. 232-4.

[As a general rule, securities on chattels in which the possession passes to the creditor are effected by way of pledge, which does not transfer ownership, but only possession (see *post*, §§ 1580-1589). But if it were held that a delivery of chattels by way of security

could not transfer the ownership, then the curious result would follow, that an assignment where the assignor retained possession would (if the requirements of the Bills of Sale Acts were complied with) be more efficacious than one where he did not. In *Flory v. Denny* (1852) 7 Exch. 581, it was held that a mortgage of chattels might be made by unsealed writing, without delivery. Such a transaction would now be void under the Bills of Sale Act, 1882.]

*Security bill
of sale*

1573. A bill of sale, given by way of security for the payment of money, ^(a) will, if executed on or after 1st November, 1882, ^(b) be void (wholly or partially) unless it complies with the requirements of the Bills of Sale Acts, 1878 and 1882. ^(c)

(a) Bills of Sale Act, 1882, s. 3. (For the definition of 'bill of sale' see Act of 1878, s. 4; and *ante*, § 1560.)

[Whether a 'hire-purchase agreement' is a bill of sale for the purposes of the Acts, depends upon whether it is a genuine transaction under which the property in the goods remains in the vendor, or a security for money effected by means of an assignment to the creditor followed by a pretended hiring to the debtor (*McEntire v. Crossley Bros.* [1895] A. C. 457; *Maas v. Pepper* [1905] A. C. 102). If it is the former, a sale by the hirer before the property vests in him may be treated (if not forbidden by the agreement) as an assignment of contractual rights (*Whiteley v. Hilt* [1918] 2 K. B. 808).]

(b) Act of 1882, s. 2.

(c) *Ibid.*, ss. 4, 8, 9.

[These requirements are set out in the Bills of Sale Acts, 1878 and 1882, and are (i) an inventory of the chattels comprised in the bill, (ii) attestation of the bill by a credible witness not a party, (iii) registration within seven days of execution, or, if executed abroad, of arrival in England in due course, (iv) true statement of the consideration, (v) form specified in the Schedule to the Act. Failure to observe the first requirement (s. 4) makes the bill, as to any chattels not specifically described, void 'except as against the grantor'; the omission of any of the requirements (ii) (iii) and (iv), makes the transaction totally void as a bill of sale, though, probably, not as a personal loan (*Heseltine v. Simmons* [1892] 2 Q. B.

547); the omission of requirement (v), which, however, only applies where the money secured is to be paid *by the grantor*, avoids the bill altogether, and no action can be brought on the transaction which it embodies (*Smith v. Whiteman* [1909] 2 K. B. 437; *Hall v. Whiteman* [1912] 1 K. B. 683.) It should be carefully noted that, owing to the difference in wording between s. 8 of the Act of 1878 and s. 8 of the Act of 1882, and to the operation of s. 4 of the Act of 1878, the earlier statute applies only to (absolute) bills where the grantor retains possession, while the later applies to all (security) bills where possession does not pass to the grantee. The object of registration (which, though the Act of 1882 does not expressly require it, must be repeated every five years (*Fenton v. Blythe* (1890) 25 Q. B. D. 417)) is, of course, to secure publicity; and any one may inspect and take copies of registered bills of sale, on payment of fees (Act of 1878, s. 16; 1882, s. 16). The provisions of the Act of 1882 are expressly (s. 17) excluded from affecting debentures issued by incorporated companies; and, probably, they do not apply to any securities given by a company which require registration under s. 93 of the Companies (Consolidation) Act, 1908 (*Re Standard Manfg. Co.* [1891] 1 Ch., at p. 648, *per* Bowen, L. J.; *Richards v. Mayor of Kidderminster* [1896] 2 Ch. 212).]

1574. A bill of sale given by way of security for the payment of money is void, except as against the grantor, in respect of any chattels described in it of which, at the time of the execution of the bill of sale,^(a) the grantor was not the owner.^(b)

*Future-
acquired
chattels*

(a) There are exceptions for (i) growing crops, and (ii) fixtures, plant, or trade machinery substituted for those specified in the bill of sale (s. 6).

(b) Bills of Sale Act, 1882, s. 5.

[It is sufficient if the grantor is equitable owner of the chattels, e. g. a man who has already given a bill of sale of his goods can give a second, by virtue of his right of redemption (*Thomas v. Searles* [1891] 2 Q. B. D. 408). On the other hand, a bare legal owner can also give a valid bill of sale by way of security (*Re Sarl* [1892] 2 Q. B. 591).]

*Bills for less
than £30*

1575. Every bill of sale given by way of security in consideration of any sum under thirty pounds is void.

Bills of Sale Act, 1882, s. 12.

*Subject to
distress for
taxes and
parochial
rates*

1576. A bill of sale given by way of security does not protect the chattels comprised in it from distress for taxes, or poor or other parochial rates; ^(a) nor does it afford any protection against a distress for rent. ^(b)

(a) *Ibid.*, s. 14.

[Apparently it protects against general district rates, which are not parochial rates (*Richards v. Mayor of Kidderminster* [1896] 2 Ch. 212), and against an execution on a judgment for rates of any kind (*Wimbledon Local Board v. Underwood* [1892] 1 Q. B. 836).]

(b) Law of Distress Amendment Act, 1908, s. 4 (1).

*And to
'order and
disposition'
clause*

1577. A bill of sale to which the Bills of Sale Act, 1882, applies, will not, even though duly registered, prevent the chattels comprised therein being in the possession, order, or disposition of the grantor, in his trade or business, for the purposes of the Bankruptcy Act, 1883, s. 44 (iii).

Bills of Sale Act, 1882, s. 15.

Bankruptcy Act, 1883, s. 149 (2).

Swift v. Pannell (1883) 24 Ch. D. 210.

Re Ginger [1897] 2 K. B. 461.

[This is believed to be the effect of s. 15 of the amending Act, which repeals s. 20 of the Act of 1878, so far as security bills only are concerned (Act of 1882, s. 3). It is, perhaps, unnecessary to

call attention to the endless difficulties raised by the wording of the Act of 1882. It may be pointed out, however, that, if the grantee of a security bill has the right to seize the chattels comprised in it, and can do so before he has received notice of an act of bankruptcy on the part of the grantor, and before a receiving order has been made, the chattels will cease to be in the 'apparent possession' of the bankrupt (Bankruptcy Act, 1883, s. 49 (d); *Re Wright* (1876) 3 Ch. D. 70 (on the Act of 1869)).]

1578. The grantee of a bill of sale given by way of security may not seize or take possession of the chattels comprised therein for any other than (one of) the following causes: — *Causes of seizure*

- (i) default in payment of the sum or sums of money secured, at the time therein provided for payment, or in performance of any agreement in the bill necessary for maintaining the security;
- (ii) bankruptcy of the grantor, or distress on the goods for rent, rates, or taxes;
- (iii) fraudulent removal of any of the goods 'from the premises';
- (iv) failure by the grantor, without reasonable excuse, upon demand in writing by the grantee, to produce his last receipts for rents, rates, and taxes;
- (v) levy of execution against the goods of the grantor under any judgment at law.

And, even when the chattels have been rightfully seized, they may not be sold, or removed from the

premises on which they were seized, until after the expiration of five clear days from the seizure; during which time the grantor may apply to the Court or a Judge in Chambers to restrain the removal or sale.

Bills of Sale Act, 1882, ss. 7, 13.

[The prohibition against removal or sale within five days applies to all security bills, whenever executed (s. 13). Default in payment of interest secured by the bill of sale is a ground of seizure (*Ex parte Ellis* [1898] 2 Q. B. 79).]

*Registration
not construc-
tive notice*

1579. A purchaser for value of the legal property in chattels corporeal, an equitable interest in which has previously been created in favour of another person by a registered bill of sale, is not, by the mere fact of registration, deemed to have constructive notice of the existence of the equitable interest.

Joseph v. Lyons (1884) 15 Q. B. D. 280.
Hallas v. Robinson (1884) *ibid.*, 288.

Pledge

1580. A pledge of chattels corporeal is effected by delivery of such chattels to, or to a person on behalf of, the creditor ('pledgee'), without intent to pass the ownership in the chattels, but with intent that such chattels shall be a security for the payment of money.

Meyerstein v. Barber (1866) L. R. 2 C. P., at p. 51, *per* Willes, J.
Hilton v. Tucker (1888) 39 Ch. D. 669.
Grigg v. National Guardian Insurance Co. [1891] 3 Ch. 206.

[Though often spoken of as a 'special property,' the interest of the pledgee is really only possessory (*Attenborough v. Solomon* [1913] A. C., at p. 84, *per* Haldane, C.).]

1581. A pledge of goods in course of transit by sea can be effected by a deposit of the bill of lading with the pledgee with that intent. Whether such deposit is intended merely as a pledge, or as a transfer of the ownership of the goods, is a question of fact in each case. *Pledge by deposit of bill of lading*

Sewell v. Burdick (1884) L. R. 10 App. Ca. 74.

1582. A mortgagee or a pledgee of chattels corporeal has, unless the sum secured has been paid or tendered, a right to sell the chattels at any time after the day fixed for payment,^(a) or, if no day has been fixed, at any time after reasonable notice requiring payment has been given to the mortgagor or pledgor.^(b) A mortgagee (but not a pledgee) has also a right of foreclosure (*ante*, § 1402 (iii)) in similar circumstances.^(c) *Pledgee's right of sale*

(a) *Dickinson v. Capper* (1616) 1 Rolle Rep. 215.

Pigot v. Cubley (1864) 15 C. B. N. S. 701.

Donald v. Suckling (1866) L. R. 1 Q. B., at p. 604, *per* Mellor, J.

(b) *Ex parte Hubbard* (1886) 17 Q. B. D., at p. 698, *per* Bowen, L. J.

Re Morritt (1886) 18 Q. B. D., at pp. 232-4, *per Curiam*.

Deverges v. Sandeman [1902] 1 Ch., at pp. 592, 3, *per* Stirling, L. J.

Stubbs v. Slater [1910] 1 Ch., at p. 639, *per* Cozens-Hardy, M. R.

[Of course, in either case, any surplus realized by the sale goes to the mortgagor or pledgor (*Ponsolle v. Webber* [1908] 1 Ch. 254).]

(c) *Carter v. Wake* (1877) 4 Ch. D. 605.

Harrold v. Plenty [1901] 2 Ch. 314.

[These were both 'cases of choses in action. But the language of the Court applies equally to chattels corporeal.]

*Transfer of
security*

1583. A mortgagee or pledgee of chattels corporeal is entitled, even before the day for payment of the money secured has arrived, to dispose of his own interest therein, either absolutely or by way of security, subject to the rights of the mortgagor or pledgor.^(a) But, until a lawful sale for the purpose of realizing his security has been effected by the pledgee, the pledgor has (subject to § 1588) a right of redemption.^(b)

- (a) *Donald v. Suckling*, (1866) L. R. 1 Q. B. 585.
France v. Clark (1883) 22 Ch. D. 257.

[If the mortgagee or pledgee attempts to dispose of the chattels absolutely before his right to do so accrues, he will be guilty of conversion (*ante*, Bk. II, Pt. III, Sect. III, Tit. II); though, probably, he will be allowed to set off his debt against the value of the chattels (*Johnson v. Stear* (1863) 15 C. B. N. S. 330).]

- (b) *Ratcliff v. Davis* (1610) Yelv. 178.
Kemp v. Westbrook (1749) 1 Ves. Sen. 278.

[According to Lord Hardwicke in the latter case, no lapse of time bars the claim to redeem a pledge. In both cases it was said that the right to redeem is restricted to the lifetime of the pledgor, and does not pass to his executor. *Sed quære*.]

*Liabilities of
pledgee*

1584. A pledgee is not liable for damage to the chattels not arising from his own negligence;^(a) and he may add to the debt all expenses reasonably incurred by him in preserving the chattels from depreciation or loss.^(b) But a pledgee may not make any use of the chattels pledged; unless such user would not be prejudicial to the chattels.^(c)

- (a) *Ratcliff v. Davis* (1610) Yelv. 178; 1 Bulstr. 29.
Coggs v. Bernard (1704) 2 Ld. Raym., at p. 917, *per* Holt, C. J.

ACQUISITION BY WAY OF SECURITY 957

[If, however, the pledgee detains the chattels after payment or tender of the amount due, he becomes absolutely liable (*Coggs v. Bernard, ubi sup.*).]

- (b) Lord Holt, in the case of *Coggs v. Bernard, ubi sup.*, limits the compensation for expenses to user of the chattels. *Sed quære.*
- (c) *Mores v. Conham* (1609) Owen, at p. 124, *per Curiam.*
Coggs v. Bernard, ubi sup.

[Sometimes the qualification is stated more cautiously as 'unless such user would be beneficial'; and both the authorities quoted state that a pledgee who uses the pledge is absolutely responsible for its safety.]

1585. Notwithstanding § 888 (Bk. II, Pt. III, *Jus tertii of pledgee* Sect. III, Tit. III, *ante*), a pledgee may set up a *jus tertii* in a claim against him by the pledgor for a return of the goods.

Cheeseman v. Exall (1851) 6 Exch. 341.

Singer Manfg. Co. v. Clark (1879) 5 Exch. D. 37.

Cheeseman v. Exall may, however, be explained as a case of fraud. Of course, a pledgor cannot (in the absence of special circumstances) give any better title to the pledgee than he himself has (*Hoare v. Parker* (1788) 2 T. R. 376; *Attenborough v. Solomon* [1913] A. C. 76).]

1586. Notwithstanding the existence of the pledge, *Alienation by pledgor* the pledgor may alienate the chattel pledged; and the alienee will be entitled to redeem the chattel on payment of the amount due on the pledge.

Franklin v. Neate (1844) 13 M. & W. 481.

1587. Pledges in the possession of a bankrupt *Not in order and* pledgee at the commencement of his bankruptcy do

*disposition'
of pledgee*

not pass to his trustee; ^(a) and pledges are not liable to be distrained for rent owing by a pawnbroker on whose premises they are situated. ^(b)

(a) There seems to be no actual decision on pledges. But it is submitted that, if the pledgee were a pawnbroker, there would be no reputation of ownership (see expressions of Lord Selborne, C., in *Ex parte Watkins* (1873) L. R. 8 Ch. App. 521), while, if he were not, the pledge would not be 'in the order and disposition of the bankrupt in his trade or business.' Of course, the rights of the pledgee pass to his trustee in bankruptcy.

(b) *Swire v. Leach* (1865) 18 C. B. N. S. 479.

[On the other hand, the sheriff under a Fi. Fa. may sell the interest of the pawnbroker, and (*semble*) of any pledgee (*Re Rollason* (1887) 34 Ch. D. 495).]

*Pawn-
brokers Act*

1588. Pledges given on loans by pawnbrokers of sums of forty shillings or under, are subject to the provisions of the Pawnbrokers Act, 1872; ^(a) pledges given on loans by pawnbrokers above forty shillings, but not above ten pounds, are also subject to the provisions of the same statute, unless a special contract is made between the parties in manner provided by such statute. ^(b)

(a) Pawnbrokers Act, 1872, s. 10 (1).

(b) *Ibid.*, ss. 10 (1), 24.

[As between the parties, the chief differences between the statutory and the common law pledge are that the former (1) must be accompanied by a pawn-ticket, the production of which is (except in special cases) necessary and sufficient authority for delivery up of the pledge on redemption, (2) is redeemable within a year and seven days, (3) if for not more than ten shillings becomes the absolute property of the pawnbroker if not redeemed within that time, (4) if for ten shillings or upwards remains redeemable until sale, and can only be sold by public auction under statutory regulations, (5) permits of only a limited rate of profit being charged by the pawnbroker (*ibid.*, ss. 14-19).]

1589. The fact that a pledgee delivers the chattels pledged to the pledgor for a special purpose, does not necessarily deprive the pledgee of his interest in the chattels; even when the special purpose is to effect a sale of the chattels. *Return of pledge for special purpose*

North Western Bank v. Poynter [1895] A. C. 56.

[Needless to say, the pledgee would not be able to set up his right to the goods against the purchaser who had bought at a sale authorized by the pledgee. But the pledgee's right would avail against the general creditors of the pledgor.]

1590. (*Semble*) The doctrines of Tacking^(a) (*ante*, Sect. IV, Tit. II, § 1400), Consolidation^(b) (*ibid.*, § 1417), and Clogging the Equity^(c) (*ibid.*, § 1415), apply to mortgages of chattels corporeal. But the doctrine of Consolidation must not be used to defeat the policy of the Bills of Sale Acts.^(d) *Tacking, Consolidation, Clogging*

(a) *Re Salmon* [1903] 1 K. B. 147.

(b) *Spalding v. Thompson* (1858) 26 Beav. 637.
Cracknall v. Janson (1879) 11 Ch. D. 1.

(c) *Bradley v. Carritt* [1903] A. C. 253.
Jarrab Co. v. Samuel [1904] A. C. 323.

[The authorities are very scanty; and the cases quoted were all concerned with choses in action. But there seems to be no difference in principle between the two kinds of securities.]

(d) *Cbesworth v. Hunt* (1880) 5 C. P. D. 266.

[It is fairly clear, that these doctrines have no general application to pledges; because the right of the pledgor to redeem is not merely equitable, but legal (*Crickmore v. Freeston* (1870) 40 L. J. Ch. 137). The Pawnbrokers Act, 1872, s. 22, seems, however, to apply the principle of Consolidation, to a limited extent, to pledges.]

Liens

1591. A lien on chattels corporeal consists of the right to retain possession of such chattels until a certain claim or certain claims of the possessor is or are discharged. For the purposes of this Title, the person claiming to retain possession is called the 'creditor,' and the person entitled, subject to the lien, to possession of the chattels, is called the 'debtor'; whether or not the relation of debtor and creditor legally exists between such persons.

Jackson v. Cumming (1839) 5 M. & W. 342.

Shaw v. Neale (1858) 6 H. L. C., at p. 601, *per* Lord Chelmsford, L. C.

[Liens independent of possession may exist in respect of goods, by virtue of maritime law; but these, as being part of Commercial Law, are not dealt with in this work. The liens of trustees will be treated in a later Section. For liens on land, see *ante*, Sect. IV, Tit. III, § 1426. There can be no equitable lien on goods, independently of possession, analogous to the unpaid vendor's (or purchaser's) lien on land (*Lloyds Bank v. Swiss Bankverein* (1912) 108 L. T. 143).]

*'General'
and 'particular'
liens*

1592. Where a creditor is entitled to retain any chattels of the debtor in his possession to satisfy all the liabilities towards him of the debtor, or all the liabilities of a certain kind, such right is called a 'general lien.'^(a) Where the creditor's right is only to detain a specific chattel or chattels to satisfy liabilities arising in connection with such chattel or chattels, his right is said to be a 'particular lien.'^(b) Both general and particular liens may

arise (i) by operation of law,^(c) (ii) by agreement of the parties.^(d)

- (a) *Frith v. Forbes* (1862) 4 De G. F. & J., at p. 419, *per* Knight Bruce, L. J., at p. 420, *per* Turner, L. J.
- (b) *Anglo-Italian Bank v. Davies* (1878) 9 Ch. D., at p. 289.
- (c) See *post*, §§ 1593, 1595.
- (d) *Gladstone v. Birley* (1817) 2 Mer., at p. 404, *per* Grant, M. R. (general lien).
- Castellain v. Thompson* (1862) 13 C. B. N. S. 105 (particular lien).

1593. A general lien arises by operation of law in the cases of innkeepers,^(a) factors,^(b) wharfingers,^(c) packers,^(d) bankers,^(e) stock-brokers,^(f) and solicitors,^(g) who are entitled to retain possession of all chattels coming to their hands as such, until all their claims against the owners thereof in such capacities are satisfied. Any similar lien may be claimed by virtue of special custom clearly proved.^(h)

*General
liens*

- (a) *Mulliner v. Florence* (1878) 3 Q. B. D. 484. (The lien of the innkeeper is not confined to chattels belonging to the guest. See *ante*, Bk. II, Pt. II, Sect. VI, § 555).
- Angus v. McLachlan* (1883) 23 Ch. D. 330.
- (b) *Kinloch v. Craig* (1789) 3 T. R., at p. 122, *per* Ashurst, J.
- Cowell v. Simpson* (1805) 16 Ves., at p. 280, *per* Lord Eldon, C.

[This lien is sometimes called a 'consignees' lien, e. g. in *Frith v. Forbes*, *ubi sup.* It is important to note that, if a factor receives goods knowing that they have been made subject to a charge in favour of a third party, he cannot set up his general lien against such charge (*ibid.*).]

- (c) *Rex v. Humphery* (1825) McCle. & Y. 173. (This case shows that the lien prevails against the Crown claiming the goods by extent.) § 451 (*ante*) must be amended in this sense.

[But the wharfinger's lien does not cover his charges for labour-age or warehousing; unless there is a special custom to that effect

binding the owner of the goods (*Holderness v. Collinson* (1827) 7 B. & C. 212). And where, by custom, the importer has a certain period within which to pay the wharfage charges, during which time he may remove the goods, a person who purchases during such period is protected against the wharfinger's lien; even though the goods are lying at the wharf when the period expires (*Crawshaw v. Homfray* (1820) 4 B. & Ald. 52).]

(d) *Ex parte Deeze* (1748) 1 Atk. 228.

Re Witt (1876) 2 Ch. D. 489.

(e) *Davis v. Bousher* (1794) 5 T. R. 488.

Brandao v. Barnett (1846) 12 Cl. & F. 787.

[The latter case shows that the lien does not extend to chattels delivered to the bankers for a special purpose, inconsistent with the right. Nor does it extend to securities in a box the contents of which have not been put into the possession of the bankers.]

(f) *Jones v. Peppercorne* (1858) John. 430.

Londen & Globe Finance Corpn. [1902] 2 Ch. 416.

Hope v. Glendinning [1911] A. C. 419.

[The last was a Scottish case; but the laws of England and Scotland on this point are stated to be the same, and the two earlier cases are expressly approved.]

(g) *Cowell v. Simpson* (1805) 16 Ves. 275.

Re Taylor, Stileman, & Co. [1891] 1 Ch., at p. 596, *per* Lindley, L. J.

Re Morris [1908] 1 K. B. 473.

[The lien, however, only extends to the professional charges of the solicitor, not to ordinary advances or loans (*Re Taylor, Stileman, & Co.*, *ubi sup.*); and it is restricted to the client's interest in the subject-matter of documents in respect of which it is claimed (*Re Llewellyn* [1891] 3 Ch. 145). But all who take under the client are bound by it, e. g. *cestuis que trustent* whose trustee's deeds are subject to a lien by the trustee's solicitors acting as such (*Re Dee Estates* [1911] 2 Ch. 85).]

(h) *Bock v. Gorrisen* (1860) 2 De G. F. & J., at p. 443, *per* Lord Campbell, C. The cases show, however, that the Court does not favour such a custom (*Rushforth v. Hadfield* (1805) 6 East, 518).

[Some text-books state that dyers are entitled to a general lien; and *Savill v. Burchard* (1801) 4 Esp. 53 is in favour of that view.

ACQUISITION BY WAY OF SECURITY 963

But the balance of authority seems to be against it; though the claim may, doubtless, be established by proof of the existence of a special custom affecting a particular locality. (*Green v. Farmer* (1768) 4 Burr. 2214; *Close v. Waterhouse* (1801) 6 East, 523 n.; *Plaice v. Allcock* (1866) 4 F. & F. 1074; *Cassils v. Holden* (1914) 84 L. J. K. B. 834.)]

1594. Apart from statute, agreement, or special custom, neither a common carrier,^(a) nor a public warehouseman,^(b) nor an agent,^(c) has a general lien on chattels corporeal delivered to him as such. *Carriers, warehousemen, and agents*

- (a) *Rushforth v. Hadfield* (1805) 7 East, 224.
Wright v. Snell (1822) 5 B. & Ald. 350.

[A railway company has a general lien for tolls under the Railways Clauses Consolidation Act, 1845, s. 97.]

- (b) *Leuckbart v. Cooper* (1836) 3 Bing. N. C. 99.

[In *Hill v. London Central Markets* (1910) 102 L. T. 715, it seems to have been admitted, on grounds not stated, that the defendants, warehousemen, had a general lien on the goods stored with them. But this may have been by virtue of special custom or agreement.]

- (c) *Bock v. Gorrissen, ubi sup.*, at p. 443, per Lord Campbell, C. (? as to factors).

1595. A particular lien arises by operation of law, for the reasonable charges of the creditor, when he has expended labour and skill, at the request of the debtor,^(a) upon chattels bailed to him.^(b) (*Semble*) Such lien will only prevail against the interest of the person requesting the expen- *Particular lien*

diture of the services.^(c) There is no lien for voluntary services.^(d)

[The seller of goods has, in respect of the unpaid purchase-money, the lien specified in Bk. II, Pt. II, Sect. I, Tit. I, §§ 398-401, *ante*.]

- (a) *Oppenheim v. Russell* (1802) 3 Bos. & P., at p. 47, *per* Alvanley, C. J.

Chase v. Westmore (1816) 5 M. & S. 180.

Franklin v. Hosier (1821) 4 B. & Ald. 341.

Scarfe v. Morgan (1838) 4 M. & W. 270.

- (b) It is essential that the creditor shall have a possession which cannot be interrupted at the will of the debtor (*Forth v. Simpson* (1849) 13 Q. B. 680). Thus, the agister of cattle (*Chapman v. Allen* (1632) Cro. Car. 271; *Jackson v. Cummins* (1839) 5 M. & W. 342) and the livery stable keeper (*Judson v. Etheridge* (1833) 1 Cr. & M. 743) have no lien for their charges as such; though the reason is sometimes alleged to be that they do not render services which improve the value of the chattels. And the lien cannot be claimed by a person who had merely paid the workman. Thus, the captain of a ship who pays for repairs done in England has no lien for his outlay (*Wilkins v. Carmichael* (1779) 1 Doug. 101).

[The authorities extend to giving a marine insurance broker a lien on the policies effected by him, to the extent of premiums which he has paid (*Fisher v. Smith* (1878) L. R. 4 App. Ca. 1).]

- (c) *Solly v. Rathbone* (1814) 2 M. & S. 298.

Buxton v. Baughan (1834) 6 C. & P. 674.

[There may be an exception where the creditor was compellable to receive the goods, e. g. a common carrier (*Exeter Carrier's Case* (n. d.) quoted by Holt, C. J., in *Yorke v. Grenaugh* (1703) 2 Ld. Raymond, at p. 867), or an innkeeper (*Robins & Co. v. Gray* [1895] 2 Q. B. 501).]

- (d) *Nicholson v. Chapman* (1793) 2 H. Bl. 254.

Express contract not inconsistent

1596. The fact that the chattels were delivered to or acquired by the creditor under an express contract with regard to remuneration, does not prevent the acquisition of a lien by operation of law; if the

ACQUISITION BY WAY OF SECURITY 965

contract contains nothing inconsistent with such lien.

Chase v. Westmore, *ubi sup.*

Scarfe v. Morgan, *ubi sup.*

Fisher v. Smith (1880) L. R. 4 App. Ca. 1.

1597. Where the lien arises by agreement, the rights of the creditor are limited to the interest belonging to or capable of being disposed of by the bailor of the chattel at the time when the liability was incurred, or subsequently acquired or disposable by the bailor during the continuance of the liability.^(a) But the lien, to the extent to which it was valid against the bailor, is valid against all persons claiming through him, including his trustee in bankruptcy.^(b)

- (a) *Wright v. Snell* (1822) 5 B. & Ald. 350.
Buxton v. Baughan (1834) 6 C. P. 674, *per* Alderson, B.
Barry v. Longmore (1840) 12 A. & E. 639.
Ex parte Roy (1877) 7 Ch. D. 70.
- (b) *Lempriere v. Pasley* (1788) 2 T. R. 485.
Gurnell v. Gardner (1863) 4 Giff. 627.
Fowitt v. Union Cold Storage Co. [1913] 3 K. B. 1.

1598. A person cannot by unlawfully taking possession of chattels acquire a lien upon them.

Lempriere v. Pasley, *ubi sup.*, at p. 490, *per* Ashurst, J.

[This was a case in which the person claiming the lien had paid freight on goods of which he unlawfully obtained delivery. *Semble*, the rule would be the same if the claim arose in respect of labour expended after obtaining unlawful possession.]

*No power of
sale*

1599. Generally speaking, the person entitled to the benefit of a lien has no power of sale of the chattels.

Thames Ironworks Co. v. Patent Derrick Co. (1860) 1 J. & H. 93.

But, by statute: —

- (i) an innkeeper may sell chattels which have been brought on to his premises by a guest, in manner, and subject to the conditions specified in § 557, *ante*.

Bk. II, Pt. II, Sect. VI.

- (ii) a railway company may, after demand, sell, to satisfy tolls due to it for the use of the railway by the owner of such chattels, any chattels in respect of which such tolls are due, or any other chattels within the premises of the company belonging to the same owner;

Railways Clauses Consolidation Act, 1845, s. 97.

- (iii) an unpaid seller of goods has the right to resell the goods under the conditions specified in § 406, *ante*.

Bk. II, Pt. II, Sect. I, Tit. I.

*No charge
for safe
custody*

1600. A creditor who detains chattels for the purpose of enforcing his lien for skill and labour, is not, in the absence of special contract, express or implied,

ACQUISITION BY WAY OF SECURITY 967

entitled to add to his lien a charge for safe keeping of such chattels.

Somes v. B. E. Shipping Co. (1860) 8 H. L. C. 338.

1601. The liabilities of the creditor with regard to the safe custody of the chattels upon which he claims a lien depend upon the nature of the contract under which they are in his possession. *Liabilities of lienor*

Angus v. McLachlan (1883) 23 Ch. D. 330.

[For particulars of these various contracts, see *ante*, Bk. II, Pt. II, Sects. IV, VI, and VII.]

1602. A lien is extinguished by (i) waiver of the lien,^(a) (ii) payment or tender, by the owner of the chattels or person entitled to the possession of them, of the amount due under the lien,^(b) (iii) conversion of the chattels to the creditor's use,^(c) (iv) voluntary parting with possession of the chattels.^(d) *Extinction of lien*

(a) *Morley v. Hay* (1828) 7 L. J. O. S. 104.

Weeks v. Goode (1859) 6 C. B. N. S. 367.

(b) *Jones v. Tarleton* (1842) 9 M. & W. 675.

(c) *Jacobs v. Latour* (1828) 5 Bing. 130. (In this case the creditor procured the chattels to be taken in execution on a judgment recovered by himself against the debtor. It might, perhaps, also be treated as a case of waiver.)

Jones v. Tarleton, ubi sup.

Kerford v. Mondel (1859) 28 L. J. Ex. 303.

(d) *Sweet v. Pym* (1800) 1 East, 4.

Hill v. London Central Markets (1910) 10 L. T. 715.

[A mere demand of a larger amount than is due to the creditor does not destroy the lien (*Scarfe v. Morgan* (1838) 4 M. & W. 270).

But a refusal to give up unless the whole of an excessive demand is paid is a conversion, and does (*Jones v. Tarleton* (1842 (9 M. & W. 675).]

*Evidence of
waiver*

1603. The taking of other security for the creditor's claim,^(a) or the giving of credit for the claim,^(b) if inconsistent with the continuance of the lien, is evidence of waiver of the lien.

(a) *Wilkins v. Carmichael* (1779) 1 Doug., at p. 104, *per* Lord Mansfield, C. J.

Cowell v. Simpson (1809) 16 Ves. 275.

(b) *Hewison v. Guthrie* (1836) 2 Bing. N. C. 755.

[It was held, by Kay, J., in *Angus v. McLachlan* (1883) 23 Ch. D. 330, that the rule only applied where the taking of new security was inconsistent with retaining the lien; in other words, was an implied waiver. And this view seems to have been followed in *Re Morris* [1908] 1 K. B. 473.]

(b) *Raitt v. Mitchell* (1815) 4 Camp., at pp. 149-150.

SECTION XI

INVOLUNTARY ALIENATION OF CHATTELS CORPOREAL

1604. Upon an adjudication in bankruptcy there *Bankruptcy* passes to the trustee in bankruptcy the ownership of: ^(a) —

- (i) all such chattels corporeal as were the property of the bankrupt at the commencement of the bankruptcy; ^(b)
- (ii) all such chattels corporeal as, at the commencement of the bankruptcy, were in the possession, order, or disposition of the bankrupt, in his trade or business, with the consent of the true owner, under such circumstances that the bankrupt was the reputed owner thereof. ^(c)

And such ownership passes from trustee to trustee (including the official receiver when acting as trustee) on appointment, without any express conveyance. ^(d)

(a) Bankruptcy Act, 1914, s. 18 (1).

(b) *Ibid.*, s. 37 (1). (For the meaning of this expression see *ante*, Sect. V. § 1453, n. (d).)

(c) *Ibid.*, s. 38 (a).

(d) *Ibid.*, s. 53.

[From the operation of the rule in the text must be excepted
(a) property held by the bankrupt on trust for any other person,
(b) tools of his trade and wearing apparel, together not exceeding
£20 in value (s. 38 (1) (2)).]

*Subsequently
acquired
chattels*

1605. Subject to § 70 (Bk. I, Sect. III, Tit. I, *ante*), the ownership of chattels corporeal acquired by, or devolving on, the bankrupt before his discharge, also passes to the successive trustees in his bankruptcy, in like manner.

Bankruptcy Act, 1914, s. 38 (a).

Disclaimer

1606. A trustee in bankruptcy may disclaim, in manner and subject to the conditions specified in Sect. V, §§ 1454-1456, *ante*, any chattels corporeal forming part of the (former) property of the bankrupt, which are unsaleable, or not readily saleable, by reason of their binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money; and such disclaimer will operate in manner expressed in §§ 1454-1456 aforesaid.

Ibid., s. 54 (1).

[Examples of chattels corporeal disclaimable on the above grounds would be (1) goods to which a liability for freight attached, (2) goods pledged for more than their value. But there do not appear to be any decisions with regard to chattels corporeal; though there are many with regard to leases and choses in action.]

Execution

1607. Subject to certain exceptions,^(a) any of the chattels corporeal of a judgment debtor, wherever situate within the jurisdiction,^(b) may be seized by the sheriff or County Court bailiff, to satisfy a judg-

ment or order of the Court for payment of money.^(c) But the property in the chattels is not divested from the debtor until a proper sale has been effected by the sheriff or bailiff.^(d)

- (a) The most important exceptions are (1) the wearing apparel and bedding of the debtor or his family, and his tools or implements of trade, up to the value of five pounds (Small Debts Act, 1845, s. 8; County Courts Act, 1888, s. 147), and (2) the rolling stock of a railway company (Railway Companies Act, 1867, s. 4).
- (b) If goods have been removed to the house of a third person to evade execution, the sheriff may even (after request to open) break into such house to seize the goods. Otherwise the sheriff may not break into a house at the suit of a private person (*Semayne's Case* (1605) 5 Rep. 91 a). If the sheriff enters the house of a stranger on mere suspicion that the debtor's goods are there, he acts at his own risk. But he is justified in entering any house where the debtor's goods might reasonably be expected to be (e. g. that of the debtor's executor), whether in fact the goods are there, or not (*Cooke v. Birt* (1814) 5 Taunt. 765).
- (c) Judgments Act, 1838, s. 12. (This enactment extended the sheriff's powers to money, bank-notes, and negotiable instruments, which were not seizable at the common law under a Fi. Fa.). County Courts Act, 1888, s. 147.
- (d) *Giles v. Grover* (1832) 6 Bligh, N. S. 277.

[The writ of Fi. Fa. now only binds the debtor's chattels from the time at which it is lodged with the sheriff or bailiff for execution; and a *bonâ fide* acquirer for value of the chattels, after the lodging of the writ, but before actual seizure, is protected if he had no notice of the lodging of the writ (Sale of Goods Act, 1893, s. 26). Generally speaking, chattels in the hands of the sheriff or bailiff under a writ of execution cannot be distrained for rent (*Wharton v. Taylor* (1848) 12 Q. B., at p. 677, *per* Patteson, J.); though there is an exception for growing crops if there is no other sufficient distress (Landlord and Tenant Act, 1851, s. 2). And an execution creditor is not entitled to the benefit of his execution, if he has notice of an act of bankruptcy committed by the debtor before completion of the execution by seizure and sale (Bankruptcy Act, 1914, s. 40). An ingenious evasion of similar provisions in earlier bankruptcy legislation has been stopped by the section abolishing the application of the writ of *Elegit* (*ante*, Sect. V, § 1457, n.) to goods (*ibid.*, s. 146). The Crown has prerogative remedies against

the goods of its debtors and their debtors, without proceeding to judgment, similar to those which it enjoys against the lands of such persons (*ante*, Sect. V, § 1457, n., and *Pridgeon v. Mellor* (1912) XXVIII T. L. R. 261).]

*Distress for
rent*

1608. *Primâ facie*, but subject to various exemptions,^(a) the landlord of any premises may seize and sell, under a distress for rent,^(b) any chattels corporeal found upon the premises; whether they are the property of the tenant, or not.^(c) But the property in the chattels is not divested, until a proper sale to a stranger has been effected by or on behalf of the distrainor.^(d)

- (a) The number of exemptions from distress is considerable; and the subject is too complicated to be described in detail. Briefly, the absolute exemptions are (i) animals *feræ naturæ* (Co. Litt. 47 a), (ii) chattels in actual use (*Simpson v. Hartopp* (1744) Willes, 512), (iii) chattels delivered by the owner to be dealt with by the occupier of the premises in the way of his public trade (*ibid.*), (iv) chattels in the custody of the law, e. g. already seized under an execution or distress (*Wharton v. Naylor* (1848) 12 Q. B., at p. 677, *per* Patteson, J.) — but the landlord can insist on arrears of rent not exceeding one year being paid before the chattels are removed under an execution (8 Anne (1709) c. 18 (14) s. 1), (v) perishable goods (*Morley v. Pincombe* (1848) 2 Exch 101), (vi) loose money (because it cannot be identified), (vii) fixtures (*Darby v. Harris* (1841) 1 Q. B. 895; *Crossley Bros. v. Lee* [1908] 1 K. B. 86), (viii) chattels of the Crown on land occupied by a subject (*Sec. of State v. Wynne* [1905] 2 K. B. 845), (ix) machinery of a stranger lent under an agreement to the tenant of an agricultural holding for purposes of his business, and live stock of a stranger on such holding solely for breeding purposes (Agricultural Holdings Act, 1908, s. 29 (4)), (x) wearing apparel and bedding protected from seizure in execution by s. 147 of the County Courts Act, 1888 (*ante*, § 1607, n. (a)) (Law of Distress Amendment Act, 1888, s. 4), (xi) chattels of an under-tenant, lodger, or stranger having no interest in the premises, who conforms to the requirements of the Law of Distress Amendment Act,

1908 (ss. 1, 2). This last exemption seems practically to abolish the common law rule which made a stranger's goods liable to seizure under a distress for rent by the landlord of the premises where they might happen to be. Certain other classes of chattels are privileged *sub modo* — i. e. if there is other sufficient distress on the premises. On the other hand, the goods of a lessee fraudulently removed by him for the purpose of avoiding distress, may be seized by the landlord within thirty days; if in the meantime they have not been sold to a *bonâ fide* purchaser for value (Distress for Rent Act, 1737, ss. 1, 2).

- (b) The power of sale did not exist at the common law; but was conferred by a statute of the year 1689 (2 W. & M. St. I, c. 5). The right of sale is subject to many rules and restrictions (see especially Law of Distress Amendment Act, 1888).
- (c) At common law, the power to distrain belonged only to a reversioner, in respect of services. But, by the Landlord and Tenant Act, 1730, s. 5, it was extended to owners of rents seck, rents of assize, and chief rents (*ante*, Sect. I, Tit. IX, § 1287, n.), and by the Conveyancing Act, 1881, s. 44, to the owners of all annual sums charged on land which are twenty one days in arrear. But this last remedy is only given 'in so far as it might have been conferred by the instrument under which the annual sum arises.' As to the doubt raised by these words, see *ante*, Sect. I, Tit. IX, § 1289, n.).
- (d) *King v. England* (1864) 4 B. & S. 782.
Moore v. Singer Manfg. Co. [1904] 1 K. B. 820.
Plaswyced Collieries Co. v. Partridge [1912] 2 K. B. 345.

SECTION XII

INCAPACITY TO HOLD AND ALIENATE CHATELS CORPOREAL

Aliens

1609. An alien can acquire and alienate chattels corporeal, in the same manner and to the same extent as a British subject ; ^(a) except that he cannot (unless a denizen) acquire any interest in a British ship (*ante*, Bk. I, § 72). ^(b)

(a) British Nationality and Status of Aliens Act, 1914, s. 17.

(b) Merchant Shipping Act, 1894, s. 1.

Minors

1610. A minor (being of an age to understand the nature of the transaction) can acquire and alienate chattels corporeal in the same manner as a person of full age ; ^(a) except that he cannot, unless he is a soldier in actual military service, or a mariner or seaman at sea, make a valid testament. ^(b)

(a) *Taylor v. Johnston* (1882) 19 Ch. D. 602.

Valentine v. Canali (1889) 24 Q. B. D. 166.

(b) Wills Act, 1837, ss. 7, 11 ; 1918, s. 1.

[It is somewhat doubtful whether the doctrine of the text applies to acquisitions or alienations otherwise than by delivery of the chattels. In view of the importance of the subject, the amount of authority on it is astonishingly small.]

Minors and powers

1611. A minor may exercise, by act *inter vivos*, a power of disposition of chattels corporeal, if it was the

apparent intention of the donor or the power that it should be exerciseable by a minor.

Re Cardross' Settlement (1878) 7 Ch. D. 728.

Re D'Angibau (1880) 15 Ch. D. 228.

[But, presumably, any disposition of the minor's own interest would be revocable by him. (See remarks of Jessel, M. R., in *Re D'Angibau*, *ubi sup.*, at p. 234.) A minor, not being a soldier in actual military service or a mariner or seaman at sea, cannot exercise a power by testament (Wills Act, 1837, ss. 7, 11).]

1612. A minor has the same statutory power of making, with the consent of the Court, a binding settlement on his or her marriage, of chattels corporeal as of land. *Minors and marriage settlements*

Bk. III, Sect. VII, Tit. I, § 1500, *ante*.

1613. A married woman may acquire and, subject to any restraint on anticipation (*ante*, Bk. I, § 105), dispose of chattels corporeal,^(a) either in her own right or as trustee or personal representative,^(b) and may exercise any power in respect of such chattels,^(c) unless the donor of the power has expressly or by implication forbidden such exercise by a married woman.^(d) And a married woman may release^(e) or disclaim^(f) any power; except in such a way as to remove a restraint on anticipation. *Married women*

(a) Married Women's Property Act, 1882, s. 1.

(b) Married Women's Property Act, 1907, s. 1.

(c) *Wood v. Wood* (1870) L. R. 10 Eq. 220.

(d) *Horseman v. Abbey* (1819) 1 J. & W. 381.

Morris v. Howes (1845) 4 Ha. 599.

[The question generally arises on a doubt whether a power conferred on a married woman by her marriage settlement can be exercised by her during a subsequent coverture. *Semble*: such a question could still arise, notwithstanding the Married Women's Property Acts.]

(e) Conveyancing Act, 1881, s. 52 (1).

(f) Conveyancing Act, 1882, s. 6 (1).

*Election by
married
woman*

1614. A married woman may elect so as to bind her interests in chattels corporeal, to the same extent and subject to the same restrictions as in the case of land (*ante*, Sect. VII, Tit. II, § 1509).

Rutter v. Maclean (1799) 4 Ves. 531.

Cabill v. Cabill (1883) L. R. 8 App. Ca., at p. 426, *per* Lord Selborne, C.

Re Vardon's Trusts (1885) 31 Ch. D. 275.

[The chief restriction is, that she cannot so elect as to destroy a restraint on anticipation (*Re Vardon's Trusts, ubi sup.*). It was doubted in *Smith v. Lucas* (1881) 18 Ch. D., at p. 544, whether a married woman could elect so as to bind her future-acquired separate estate. But this doubt has, probably, since the passing of the Married Women's Property Act, 1893, s. 1, ceased to be of importance; though the exercise of an election is not a 'contract.']

*Corporations
sole*

1615. Apart from statute or special custom, a corporation sole cannot acquire, and, therefore, cannot alienate, chattels corporeal in its corporate capacity.

Fulwood's Case (1591), 4 Rep., at 65 a, *per Curiam*.

Howley v. Knight (1849) 14 Q. B. 240 (bond).

Power v. Banks [1901] 2 Ch. 487.

*Alienation by
non compos,
&c.*

1616. The powers of alienation (if any) exercise-able by an idiot,^(a) a lunatic so found,^(b) a person of

unsound mind (not being an idiot or a lunatic so found),^(c) a drunken person,^(d) a convict or the administrator or curator of his property,^(e) and a trustee in bankruptcy (in respect of the property divisible among the creditors of the bankrupt),^(f) in relation to chattels corporeal, are similar (*mutatis mutandis*) to the powers exerciseable by such persons in relation to land (*ante*, Bk. I, §§ 64–66, 69; Bk. III, Sect. VII, Tit. V).

(a) *Beverley's Case* (1603) 4 Rep., at 126 b.

(b) *Re Walker* [1905] 1 Ch. 160.

(c) *Molton v. Camroux* (1849) 4 Exch. 17.

(d) *Matthews v. Baxter* (1873) 42 L. J. Ex. 73. (This was contract; but the power to acquire and alienate chattels appears to depend on contractual capacity.)

(e) Forfeiture Act, 1870, ss. 9, 12, 25, 30.

Trustee Act, 1893, s. 48.

(f) Bankruptcy Act, 1914, s. 55.

Re Rose [1904] 2 Ch. 348; [1905] 1 Ch. 94.

BOOK III

PROPERTY (*continued*)

C—CHoses IN ACTION

SECTION XIII

NATURE AND DEFINITION OF CHoses IN ACTION

TITLE I—GENERAL

1617. For the purposes of this and the next following Section, the term ‘chose in action,’ unless otherwise specified, includes all kinds of incorporeal personal property, other than (i) rights immediately connected with land, (ii) rights to sue for unliquidated damages, (iii) rights arising by virtue of trusts, (iv) rights to shares in the estates of deceased persons, and (v) negotiable instruments. *‘Chose in action’*

[The vagueness of the phrase ‘chose in action’ in English law has been previously noticed (Bk. I, § 41 n.); and it would be difficult to frame an exact definition of a conception the scope of which enlarges from year to year at the bidding of practical

requirements. Probably the term came into use as a convenient expression to cover all forms of property which were incapable of inclusion in the medieval classification of land and chattels; and it is in this sense that it is here adopted as a third division of this Book. But, unfortunately, the Courts have on some occasions applied it to rights, e. g., of presentation to a vacant ecclesiastical benefice (*Brooksie's Case* (1588) Cro. Eliz. 173) and rights to relief against forfeiture of leases (*Howard v. Fanshawe* [1895] 2 Ch. 581), which are more appropriately now regarded as interests in land, and have, accordingly, been so treated in this work. The nature and incidents of the right to sue for damages for breach of contract or quasi-contract, or for the commission of a tort, have also been dealt with under the Law of Obligations (*ante*, Bk. II, Pt. I, Sect. IV; Pt. III, Sect. I, Tit. VI). There is a very close resemblance between choses in action and the rights of beneficiaries under a trust, a testament, or an intestacy; but, for historical reasons, such rights were not usually regarded by the Common Law Courts as actionable, and were enforced in other tribunals. Hence they will be more conveniently treated under the special heads of Trusts and Succession (*post*, Sect. XVII, and Bk. V). Negotiable instruments, being governed by the Law Merchant as adopted and modified by the Bills of Exchange Acts, 1882 and 1906, do not form part of the subject-matter of this work.]

*Rules affect-
ing choses in
action*

1618. Generally speaking, and subject to Section XIV, *post*, the rules affecting the ownership of chattels corporeal (*ante*, Sect. IX), the acquisition of chattels corporeal absolutely or by way of security (*ante*, Sect. X, Tit. I), and the incapacity to hold or alienate chattels corporeal (*ante*, Sect. XII), are applicable equally to choses in action as defined in § 1617.

But:—

- (i) the provisions of the Sale of Goods Act, 1893, including the doctrine of sale in market overt (*ante*, Sect. X, Tit. I,

§ 1568) have no application to choses in action;

Sale of Goods Act, 1893, s. 62.

- (ii) notwithstanding the general rule of Equity on the subject of mortgages (*ante*, Sect. IV, Tit. II, § 1415 (i)), debentures issued by a company incorporated under the Companies Act, 1908, may be made irredeemable, or redeemable only on the happening of a contingency, however remote, or at the expiration of a period, however long;

Companies Act, 1908, s. 103.

- (iii) a minor who acquires choses in action may repudiate them before or within a reasonable time after attaining his majority;^(a) and (*semble*) a minor cannot, except by virtue of special statute, make a binding alienation of a chose in action.^(b)

(a) *Newry and Enniskillen Ry. Co. v. Coombe* (1849) 3 Exch. 565.
Curtis' Case (1868) L. R. 6 Eq. 455.
Capper's Case (1868) L. R. 3 Ch. App. 458.

[*Mann's Case* (*ibid.* n.) which, apparently, treated the transfer to the infant as a mere nullity, would appear to have been wrongly decided. An infant may even be sued for calls on shares held by him (*N. W. R. Co. v. McMichael* (1850) 5 Exch. 114).]

(b) Practically the only modern authority on the capacity for alienation by a minor, viz. the case of *Taylor v. Johnston* (1882) 19 Ch. D. 603 (*ante*, Sect. XII, § 1610) dealt only with gifts of chattels corporeal, including bank-notes, which are not choses in action for the purposes of this Section; and the Court limited its decision to alienation by delivery.

[Reference to a proceeding which applies only to choses in action may perhaps here be made; though it is not necessarily a security in the nature of a mortgage. This is the notice, accompanied by an office copy of an affidavit claiming an interest in stock, shares, or securities standing in the books of a company (including the Bank of England), which may be given to the company in manner provided by R. S. C., O. XLVI, rr. 4-7, and which has the effect of the abolished writ of Distringas (r. 8). The company which has received such notice is bound to give the person lodging it eight days' notice of any attempted transfer of the stock, &c., by any other person; and, during that time, the person giving the notice may commence an action for an injunction to prevent the company registering the transfer (*Re Blaksley's Trusts* [1883] 23 Ch. D. 549).]

'Possession'
of choses in
action

1619. There can be no possession of a chose in action. But:—

- (i) debts due or growing due to a bankrupt in the course of his trade or business will be deemed to be in his 'order and disposition' for the purposes of the Bankruptcy Acts, until notice of a transfer has been received by the respective debtors, or the true owner has taken every possible step to 'obtain possession of the debt';

Bankruptcy Act, 1914, s. 38 (c).

Colonial Bank v. Whinney (1886) L. R. 11 App. Ca. 426.

Rutter v. Everett [1895] 2 Ch. 872.

- (ii) the delivery of documents of title to choses in action, by way of security for the payment of money, will entitle the person to whom or on whose behalf such deli-

very is made to a charge in equity upon such choses in action, and a lien upon such documents of title;

Colonial Bank v. Whinney, *ubi sup.*, at p. 433, *per* Lord Blackburn.

[For the nature and effects of an equitable charge, see *ante*, Sect. IV. Tit. III; of a lien, *ante*, Sect. X. Tit. II, §§ 1591-1603.]

(iii) a deposit of a bill of lading by way of security will have the effect described in Sect. X. Tit. II, § 1581 (*ante*); but it will not transfer the right to sue or the liability to be sued on the contract with the ship-owner, unless it was the intention of the parties that the property in the goods should pass to the creditor;

Bills of Lading Act, 1855, s. 1.

Sewell v. Burdick (1884) L. R. 10 App. Ca. 74.

[As to the effect of allowing documents of title to remain in the hands of a vendor or purchaser of goods, see *ante*, Bk. II, Pt. II, Sect. I, Tit. I, § 405.]

(iv) a *donatio mortis causâ* of choses in action may be validly effected by a delivery to the intended donee of a document which, in the opinion of the Court, forms the indicia of title to property.

Duffield v. Elwes (1827) 1 Bli. N. S. 497 (bonds and mortgages).

Moore v. Darton (1851) 4 De G. & Sm. 517 (receipt containing terms).

Re Dillon (1890) 44 Ch. D. 76 (banker's deposit notes).

Re Weston [1902] 1 Ch. 680 (Post Office Savings Bank Book).

Re Beaumont, *ibid.* 889 (cheque).

Hudson v. Spencer [1910] 2 Ch. 285 (banker's deposit notes).

[The principles upon which the Court proceeds in arriving at this conclusion are far from clear; and the cases by no means easy

to reconcile. Thus, for example, the handing over of a mere receipt for money will not be a good *donatio mortis causâ* (*Re Davis* (1902) 86 L. T. 889); nor will the delivery of certificates of railway stock (*semble*, not being to bearer) (*Moore v. Moore* (1874) L. R. 18 Eq. 474). And the delivery of title deeds does not pass any interest in the land (*Duffield v. Elwes*, *ubi sup.*, at p. 539, *per* Lord Eldon, following Lord Hardwicke.) According to the ordinary rule of delivery (*ante*, Sect. VIII, Tit. I, § 1531), a chose in action of which the documents of title are already in the possession of the intended donee, may be made the property of the donee by mere oral direction (*Cain v. Moon* [1896] 2 Q. B. 283). See further on *donationes mortis causâ*, *post*, Bk. V, Sect. I, Tit. IV, §§ 2040—2046.]

TITLE II—DEBTS

1620. A debt is a definite sum of money recoverable from one person (the 'debtor') by another person (the 'creditor') by means of a common law action; whether payment can be claimed immediately or not. *Definition of debt*

Guardians of West Ham v. Bethnal Green [1896] A. C. 477.
Sharpington v. Fulham Guardians [1904] 2 Ch. 449.
Re Mitchell [1913] 1 Ch. at p. 206, *per* Parker, J.

[Historically, the 'specific' character of a claim in debt has been of great importance; and, though the long prevalent distinction between the quasi-proprietary action of Debt and the purely personal action of Assumpsit has disappeared with changes in legal procedure, its effects have by no means disappeared. Thus, while it may be said, broadly, that claims to unliquidated damages can only arise out of contract or tort, 'debts' may be payable also by virtue of tenure, statute, bond (which originally was not regarded as a contract), judgment, a call on shareholders, a failure to perform public liabilities, and other causes. And, even now, the distinction between a debt and an unliquidated claim under a contract may be practically important; e. g. a right to the performance of a contract for personal services is not assignable, but a right to a definite sum of money due under such a contract is (*Crouch v. Martin* (1707) 2 Vern. 595; *Russell v. Austin Fryers* (1909) XXV T. L. R. 414).]

1621. A 'debt of record' is a debt which is payable by virtue of a recognizance^(a) entered into with the Crown or a person acting on behalf of the Crown, or by virtue of a judgment or other order of an English court of record. Such debts can be enforced in *Debt of record*

a summary manner by execution or other process of the court.^(b) In the case of debts due to the Crown on recognizance, there is no limitation of time for their recovery.^(c) In the case of a judgment debt due to a private person, execution cannot be issued without the leave of the court after six years from the date of the judgment;^(d) and, after twelve years, the judgment can no longer be enforced, by action or otherwise, unless in the meantime a written acknowledgment or part payment of the debt has been given or made by the debtor or his agent, to the creditor or his agent.^(e)

- (a) A recognizance has been judicially defined as an acknowledgment of a "fixed debt due to the Crown, which may be discharged by the fulfilment of a certain condition, or which, on its non-fulfilment, becomes an absolute debt" (*Re Nottingham Corporation* [1897] 2 Q. B., at p. 513, *per* Ridley, J.). A very similar acknowledgment, known as a *cognovit* or *cognovit actionem*, or warrant of attorney to confess judgment, was, at one time, frequently given to private creditors; and it is still technically possible, though difficult to make use of, being regulated by ss. 24-28 of the Debtors' Act, 1869. But it was merely a step leading to judgment; and it has, in practice, been superseded by a judge's order giving leave to sign judgment on certain conditions (*Gowan v. Wright* (1886) 18 Q. B. D. 201).
- (b) Of course, the existence of summary remedies does not prevent the creditor resorting to an action if he pleases; except in the case of County Court judgments, upon which no action can be brought (*ante*, Bk. II, Pt. III, §§ 716, 717).
- (c) *Regina v. Bayly* (1841) 1 Dr. & W. 213 (Sugden, L. C. I.).

[The limitation of time when a private person is suing on a recognizance is twenty years from the cause of action (Civil Procedure Act, 1833, s. 3).]

- (d) R. S. C., O. XLII, rr. 22, 23.
- (e) Real Property Limitation Act, 1874, s. 8.
Hebblethwaite v. Peever [1892] 1 Q. B. 124.
Jay v. Johnstone [1893] 1 Q. B. 189.

1622. A 'specialty debt' is a debt which is payable by virtue of a deed or other sealed document.^(a) *Specialty debt*
 Generally speaking, such a debt can be sued for at any time within twenty years after the cause of action arose, or within twenty years from the last acknowledgment in writing or part payment of the debt by the party liable or his agent.^(b)

(a) *Re Artizans Land and Mortgage Corporation* [1904] 1 Ch. 796.

[Where the debt, though arising in connection with a transaction embodied in a deed, does not arise from any covenant, express or implied, it would seem that it is only a simple contract debt (*D. of Ancaster v. Meyer* (1785) 1 Bro. C. C., at p. 464, *per* Lord Thurlow, C.; *Yates v. Aston* (1843) 4 Q. B., at p. 196, *per Curiam*). But this appears to be somewhat inconsistent with the terms of the Civil Procedure Act, 1833, s. 3, which treats 'any action of debt for rent upon an indenture of demise' as an action on a specialty.]

(b) Civil Procedure Act, 1833, ss. 3, 5.

1623. A 'bond debt' is a debt due by virtue of a sealed acknowledgment by the debtor ('obligor') of his liability to pay to the creditor ('obligee') a certain sum of money.^(a) *Bond debt*
 Where to such acknowledgment is annexed a condition that the bond shall be void on payment of a smaller sum of money and interest, the bond is said to be a 'money bond'; and, on breach of the condition, the sum payable under such condition, with interest and costs, but no more, may be recovered in an action on the bond.^(b) Where the condition of the bond is the performance of any covenants or agreements in any indenture, deed, or

writing, the obligee, in an action on the bond, must assign breaches, and can only recover such sums as the jury assign in respect thereof, and costs;^(c) but where the condition of the bond is the performance or non-performance of some other act, then the obligee, on breach of the condition, may recover the full amount of the sum for which the bond was given.^(d)

(a) *Morant v. Gough*, (1827) 7 B. & C. 206. (This case shows that the bond need not take the form of a condition with a penalty.)

(b) 4 & 5 Anne (1705) c. 3, s. 13.
Gerrard v. Clowes [1892] 2 Q. B. 11.

(c) 8 & 9 Will. III (1696) c. 11, s. 8.

[Judgment may, however, be recorded for the full amount of the penalty, and, in the event of further breaches, execution for further sums may be issued by leave of the Court (*ibid.*).]

(d) *Strickland v. Williams* [1899] 1 Q. B. 382.

[This decision does not, apparently, interfere with the general principle by which Equity will relieve against penalties (*ante*, Bk. I, § 117; Bk. II, Pt. I, § 313).]

Debts payable by virtue of statute

1624. All debts arising directly out of statutes, including liabilities for calls on shares, are specialty debts, and can be recovered at any time within twenty years after the happening of the cause of action;^(a) except that all actions for any forfeiture upon any statute penal, whereby the forfeiture is limited to the Crown only,^(b) and all actions for penalties, damages, or sums of money given to the party grieved by any statute,^(c) must be brought within two years after the causes of

such actions arose; and all penal actions for any forfeiture upon any statute penal whereby the forfeiture is limited to the Crown and to any other who may prosecute in that behalf, must be brought within one year after the offence has been committed.^(d)

(a) *Corke & Bandon Ry. Co. v. Goode* (1853) 13 C. B. 826.

(b) 31 Eliz. (1589) c. 5, s. 5 (the persons bringing such actions are technically known as 'common informers').

(c) Civil Procedure Act, 1833, s. 3.

[An action by the official of a quasi-public authority for penalties for the infringement of a statute regulating trade or manufacture, is not an action by a 'party grieved' within this section (*Robinson v. Currey* (1881) 7 Q. B. D. 465).]

(d) 31 Eliz. (1589) c. 5, s. 5. (These actions are technically known as 'qui tam' actions).

1625. Subject to the special provisions of any statute affecting the same, all debts other than those specified in §§ 1621-1624 *ante*, are 'simple contract debts,' and can be recovered by action within six years after the cause of action arose,^(a) or after a written acknowledgment or part payment by the party liable,^(b) or by his agent duly authorized.^(c)

(a) Civil Procedure Act, 1833, s. 3.

(b) Statute of Frauds Amendment Act, 1828, s. 1.

(c) Mercantile Law Amendment Act, 1856, s. 13.

[The last enactment does not expressly refer to payments by an agent. But, presumably, on general principles, payment by a duly authorized agent is payment by the principal. At one time, the distinction between specialty and simple contract debts was of great importance in the administration of the estates of deceased persons; but the distinction has been almost entirely abolished by the Admin-

istration of Estates Act, 1869. Debts of record still, however, retain their priority in such cases. In bankruptcy proceedings, all debts (other than those specially provided for by s. 38 of the Bankruptcy Act, 1914) are payable *pari passu*.]

Foreign judgments

1626. Sums certain due under foreign judgments may be recovered as debts in English courts, subject to the provisions set out in Book II, Pt. III, § 716, *ante*; but such debts are only simple contract debts, and (*semble*) have no priority in the administration of the estates of deceased persons.

Walker v. Witter (1778) 1 Doug. 1.

Hall v. Odber (1809) 11 East, 118.

[Legal phraseology is familiar with many other classes of debts, e. g., 'book debts' (debts due in the course of business and recorded in the books of the creditor), 'mortgage debts,' 'gambling debts,' &c. But these are, for the most part, merely descriptive, and have no technical meanings.]

Actions by common informers

1627. An action of debt, or information, by a common informer for a penalty, is barred by the pendency of a *bonâ fide* action, or information, previously commenced by another person, against the same defendant, for the same penalty; even though the earlier action has not been brought to trial.

Chalchman v. Wright (1603) Noy, 118.

Girdlestone v. Brighton Aquarium (1878) 3 Ex. D. 137.

Forbes v. Samuel [1913] 3 K. B. 706.

[The later action is not abated (*Baines v. Blackbourne* (1755) Sayers, 216; *Combe v. Pitt* (1763) 3 Burr. 1423). And so, presumably, if the earlier action is withdrawn or defeated, the later may be proceeded with.]

TITLE III—ANNUITIES AND PENSIONS

1628. An annuity or pension is a certain yearly sum^(a) (whether payable by instalments or not,^(b) and whether liable to increase, reduction, or cesser, on the happening of a condition, or not^(c)) payable to a definite person or persons ('annuitant') for a wholly uncertain period,^(d) or for a term of years or life, or in perpetuity.^(e) Even when an annuity is charged on land,^(f) or when it is granted to a man and his heirs,^(g) it is personal estate. Definition

- (a) The essence of an annuity is, that it is in the nature of income only.
A bond may be given to secure the payment of an annuity ; but if a principal sum is secured, the income is not an annuity (*Winter v. Mouseley* (1819) 2 B. & C. 802). There does not seem to be any difference in principle between an 'annuity' and a 'pension ;' but the latter term is usually confined to annuities given as a reward for past services, real or imaginary (See remarks of Joyce, J., in *Knill v. Dumergue* [1911] 2 Ch., at p. 203).
- (b) *Blackborn v. Edgley* (1719) 1 P. Wms. 600.
Re Dowse (1881) 50 L. J. Ch. 285.
- (c) *Martin v. Margham* (1844) 14 Sim. 230.
Arnot v. Tyrrell (1855) 21 Beav. 49.
Thompson v. Cartwright (1863) 33 Beav. 178.
Adams v. Adams [1892] 1 Ch. 369.
Re Adamson (1913) 108 L. T. 179.

[Of course, if the condition is contrary to the policy of the law (*ante*, Bk. I, §§ 114–117) it will be void (*Hunt-Foulston v. Furber* (1876) 3 Ch. D. 285).]

- (d) *Turner v. Turner* (1783) 1 Bro. C. C. 317.

[Lord Loughborough's *dicta* in the latter part of his judgment are not entirely consistent with now generally accepted views.]

K K

- (e) *A. G. v. Christ's Hospital* (1831) 9 L. J. (O. S.) 186 (perpetuity).
Thompson v. Cartwright, *ubi sup.*
Blight v. Hartnoll (1881) 19 Ch. D. 294 } (life).
Re Morgan [1893] 3 Ch. 222 }
Re Drayton [1912] 56 Sol. Jo. 253 (*per autre vie*).

[The presumption, in the absence of special circumstances, is that an annuity is for the life of the annuitant; and, even in a testament, a gift of an annuity to the legatee, simply, will only create a life interest (*Blight v. Hartnoll*, *ubi sup.*, at p. 296, *per* Fry, J.; approved in *Re Morgan*, *ubi sup.*, at p. 229, *per* Lindley, L. J.).]

- (f) *Taylor v. Martindale* (1841) 12 Sim. 158.
Re Baxter (1911) 104 L. T. 710.

[No life annuity granted since 25th April, 1855, otherwise than by will or marriage settlement, has any effect on land, as to purchasers, mortgagees, and creditors, until a memorandum of it has been registered under the Judgments Act, 1855. Satisfaction may be entered up under the Crown Debts and Judgments Act, 1860, s. 2. It seems somewhat difficult to distinguish between a rent charge and an annuity charged on land; now that (*semble*) the owner of such an annuity can distrain under the provisions of the Conveyancing Act, 1881, s. 44. And yet a rent charge is real estate (*ante*, Sect. I, Tit. IX, §§ 1287-1294), while an annuity, even though charged on land, is, *semble*, personalty. Probably the point would be settled by the language of the grant (*Re Baxter*, *ubi sup.*).]

- (g) *E. of Stafford v. Buckley* (1750) 2 Ves. Sen. 170.
Radburn v. Jervis (1841) 3 Beav. 540.

[A limitation of an annuity to the annuitant and the heirs of his body creates a fee simple conditional; and, on the birth of issue, the annuitant may aliene in perpetuity (*E. of Stafford v. Buckley*, *ubi sup.*, at p. 180, *per* Lord Hardwicke, C.). It seems a little doubtful whether an annuity 'to A for ever' goes to A's heirs or his personal representatives, on his decease. In *Taylor v. Martindale*, *ubi sup.*, Shadwell, V. C. E., held the latter view; but declined to lay down a fixed rule.]

*Personal
liability of
grantor*

1629. An annuity is created by grant or by testament. It is a question of construction whether the

creator undertakes any personal liability for the payment of the annuity.

Co. Litt. 144, b.

Caine v. Chapman (1836) 5 A. & E. 647.

[*Semble* : if an annuity is granted without any reference to any fund out of which it is to be paid, the inference is irresistible, that the grantor binds himself personally to pay it.]

1630. In addition to his personal remedies (if any) *Remedies of annuitant* against the creator of the annuity, an annuitant whose annuity was created since 1881, and is charged on land, has the remedies against the land described in Sect. I, Tit. IX, § 1289, *ante*,^(a) and, whatever the date of its creation, to the remedies described in Sect. IV, Tit. III, § 1423, *ante*.^(b) Whether an annuity charged on land is enforceable against the *corpus* of the land, or only against the income,^(c) and whether, in the latter case, it may be raised out of future, or only out of current income,^(d) are questions of construction in each case. *Semble*, the terre-tenant of land is not, merely from the fact that an annuity is charged upon the land, personally liable for payment of the annuity.^(e)

(a) Conveyancing Act, 1881, s. 44.

[It was held in *Sollory v. Leaver* (1871) 40 L. J. Ch. 398, by Malins, V. C., that an annuitant whose annuity was charged on land had a right of distress under the Landlord and Tenant Act, 1730, s. 5. But there seems nothing in the language of that section to justify this view. And it would seem that the terre-tenant of land subject to a perpetual annuity has no right to redeem the annuity (*ante*, Sect. I, Tit. IX, § 1294) ; for an annuity does not 'issue

K K 2

out of the land.' He may, however, indirectly get rid of the annuity, by selling the land and applying for leave to pay into Court a sum sufficient to meet the annuity (Conveyancing Act, 1881, s. 5).]

(b) But the remedy, being equitable, is in the discretion of the Court (*Re Tucker* [1893] 2 Ch. 323).

[In the last case, the liabilities are described in the statement of facts as 'rent charges.' But the learned judge speaks of them throughout as 'annuities.']

(c) *Re Young* [1912] 2 Ch. 479.

[It seems now to be regarded as settled that, even where the annuity is stated to be payable 'out of income,' or 'rents and profits,' yet, if there is a disposition of the property 'subject to' the annuity, the corpus will be liable (*Re Howarth* [1909] 2 Ch. 19 (testament); *Re Watkins' Settlement* [1911] 1 Ch. 1 (deed). But see *Re Boulcott* (1911) L. T. 205.]

(d) *Booth v. Coulton* (1870) L. R. 5 Ch. App. 684.

Re Boden [1907] 1 Ch. 132.

(e) There does not seem to be any express authority for this proposition; but the absence of authority the other way is very strong. Even the writ of Annuity seems only to have lain against the grantor of the annuity (F. N. B. 121 H., I.). So it would appear that the line of reasoning upon which the Court of Queen's Bench, in *Thomas v. Sylvester* (1873) L. R. 8 Q. B. 368, arrived at the conclusion that a terre-tenant was personally liable for a rent charged on his land, would not apply to an annuity (*ante*, Sect. I, Tit. IX, § 1288).

*Option to
realize*

1631. Where a sum of money or other property is bequeathed for the purchase of an annuity,^(a) or where there is a direction in a testament to purchase an annuity for the benefit of a specified person,^(b) the annuitant or intended annuitant is entitled, in place of having the annuity purchased, to demand immediate payment of the sum bequeathed, or of the amount required to purchase the annuity, as the case may be.

And even if the annuitant or intended annuitant dies before any part of the annuity has become payable, such right passes to his personal representatives;^(c) though the annuity was an annuity for the life of the annuitant only.^(d)

- (a) *Woodmeston v. Walker* (1831) 2 Russ. & M. 197.
Re Robbins [1907] 2 Ch. 8.
- (b) *Ford v. Batley* (1853) 17 Beav. 303.
Re Brunning [1909] 1 Ch. 276.
- (c) *Wakeham v. Merrick* (1867) 37 L. J. Ch. 45.
- (d) *Barnes v. Rowley* (1797) 3 Ves. 305.
Bayley v. Bishop (1803) 9 Ves. 6.

[A 'restraint on anticipation' (*ante*, Bk. I, § 105) will not prevent the operation of the rule in the text, if the annuitant is unmarried when she makes the demand (*Woodmeston v. Walker*, *ubi sup.*). The right to demand payment of the capital does not, however, exist where the annuity is subject to forfeiture on alienation (*Hatton v. May* [1876] 3 Ch. D. 148); nor, it would seem, where the annuity is directly created by the testament (*Wright v. Callender* [1852] 2 De G. M. & G. 652), except where there is a deficiency of assets (*Re Ross* [1900] 1 Ch. 162). In *Hill v. Rattey* [1862] 2 J. & H. 634, the bequest was probably treated as a bequest of capital.]

1632. When an annuity is charged upon two or more separate properties, such properties must, as between their several owners, bear the burden of the annuity in proportion to their respective annual incomes from time to time, and not in proportion to their respective capital values.

Apportionment of liability

Ley v. Ley (1868) L. R. 6 Eq. 175.

[The charge in this case was probably a legal rent charge. But the principle would appear to be the same for annuities; though it would seem to be difficult to work in practice. There appears to be no other decision on the point.]

*Limitation
of time for
recovery*

1633. An annuity charged on land, or given by way of legacy, cannot be enforced after the lapse of twelve years from the time when a present right to receive the same accrued to a person capable of giving a discharge therefor, or from the giving of a written acknowledgment or part payment to the person entitled to receive the same, or his agent, by the person by whom the same is payable, or his agent;^(a) and no action of debt to recover an annuity created by specialty can be brought but within twenty years after the cause of such action.^(b)

(a) Real Property Limitation Act, 1874, s. 8.

Re Ashwell (1859) Johns., 112 (on the corresponding section of the Real Property Limitation Act, 1833).

(b) Civil Procedure Act, 1833, s. 3.

[It seems doubtful whether the statutory period under the Real Property Limitation Act runs from the date when the first payment of the annuity was due, or from each date on which an instalment ought to have been paid. The date under the Civil Procedure Act is the latter (*Amott v. Holden* (1852) 18 Q. B. 593).]

*Recovery of
arrears*

1634. Not more than six years' arrears of an annuity charged on land can be recovered;^(a) but there is no limit (subject to § 1633) to the recovery of arrears of a purely personal annuity.^(b)

(a) Real Property Limitation Act, 1833, s. 42.

Hunter v. Nockolds (1849) 1 Mac. & G. 640.

[As Wood, V. C., remarked in *Re Ashwell*, *ubi sup.*, at p. 114, it is difficult to see how arrears of an annuity can be described as 'arrears of rent or of interest' within s. 42. But *Hunter v. Nockolds* is still treated as law (*Re Lloyd* [1903] 1 Ch., at p. 400).]

(b) *Re Ashwell*, *ubi sup.*

Darley v. Tennant (1885) 53 L. T. 257.

1635. Annuities, not being annual sums made payable in policies of assurance,^(a) and not being payable in advance,^(b) are, in the absence of express stipulation, deemed to accrue from day to day; but an apportioned part is only recoverable on or after the date when the next payment would in the ordinary course have become payable.^(c)

Apportionment of payment

(a) Apportionment Act, 1870, s. 6.

(b) *Trevalion v. Anderton* (1897) 66 L. J. Q. B. 489.

(c) Apportionment Act, 1870, ss. 2, 3, 7.

[To the fact that they were recoverable by action of Debt, we probably owe the common law rule, apparently so absurd, that rents, annuities, and other payments due at fixed and stated periods, were not apportionable, and that, consequently, if the title of any creditor expired between the dates of two payments, the current instalment could not be recovered by the creditor or his representatives. This rule was first amended, in respect of rents, by the Distress for Rent Act, 1737, s. 15 (which provided only a partial remedy), and then by the Apportionment Act, 1834, which, however, at least so far as annuities are concerned, is prospective only. These provisions are still in force; but have been practically superseded (after various other efforts) by the Act of 1870, which is retrospective. The curious exception of annuities payable under policies of assurance, so carefully inserted in both the Acts of 1834 and 1870, does not seem very intelligible; and the books on Insurance Law are curiously silent on the point, though Porter (5th edn., p. 113) seems to assume that the 6th section of the Act of 1870 applies exclusively to the payment of premiums. As premiums are invariably made payable in advance, and as section 6 is perfectly unrestricted in its language, this seems rather a bold assumption.]

1636. Where a pension has been granted by the Crown, though in respect of past services, no action will lie against any Crown official for payment of the pension; even though a special fund has been granted

No action for Crown pension

to such official by the Crown for the purpose.^(a) The same rule applies to moneys voted by Parliament for the reward of public services.^(b)

(a) *Gidley v. Lord Palmerston* (1822) 3 B. & B. 275.

Kinloch v. Sec. of State for India (1882) L. R., 7 App. Ca. 619.

(b) *Grenville-Murray v. E. of Clarendon* (1869) L. R. 9 Eq. 11.

[*A fortiori*, no action will lie against a Crown official for payment of a pension which has not been actually granted (*Edmunds v. A. G.* (1876) 47 L. J. Ch. 345).]

*Alienation
of pensions*

1637. Generally speaking, the salary or emoluments of a public office under the Crown, paid out of national funds, are not assignable by the holder, or liable to the payment of his debts.^(a) But a pension in respect of past services, in respect of which no liability to future service exists, is (subject to the provisions of any Act of Parliament^(b)) assignable, and liable to be taken in execution for debt; ^(c) and, in the event of the bankruptcy of a public official or pensioner, the Court may (in the case of a public official with the consent of the chief officer of his department) order the payment to the trustee in bankruptcy of such portion of his salary or pension as the Court may think fit.^(d) The latter rule applies also to any salary or income not of an official character received by the bankrupt.^(e)

(a) *Cooper v. Reilly* (1829) 2 Sim. 560.

Ex parte Harnden (1859) 28 L. J. Bky. 18.

[But the restriction is strictly confined to *public* offices, i. e. practically, offices under the Crown paid out of national funds (*In re*

Mirams [1891] 1 Q. B., at p. 596, *per* Cave, J.). Thus it applies to the half-pay of army officers (*Flarty v. Odum* (1790) 3 T. R. 681; *Lidderdale v. D. of Montrose* (1791) 4 T. R. 248) which is probably now covered by s. 141 of the Army Act; and to the pay, half-pay, pensions, etc., of officers and men of the royal navy, including marines (Naval and Marine Pay and Pensions Act, 1865, ss. 4 and 5). But it does not apply to the emoluments of a Canonry of Windsor (*Grenfell v. Dean and Chapter of Windsor* (1840) 2 Beav. 544); nor to the salary of a workhouse chaplain, payable out of local rates (*In re Mirams, ubi sup.*), nor to the income of a college fellowship (*Feistel v. King's College, Cambridge* (1847) 10 Beav., 491).]

- (b) e. g. the last-mentioned statute, the Army Act, s. 141, and the Old Age Pensions Act, 1908, s. 6. The pension of a retired ecclesiastical incumbent is also made unassignable by statute (Incumbents Resignation Act, 1871, s. 10).
- (c) *Dent v. Dent* (1867) L. R. 1 P. & D. 366.
Willcock v. Terrell (1878) 3 Ex. D. 323.
Knill v. Dumergue [1911] 2 Ch. 199.
- (d) Bankruptcy Act, 1914, s. 51.
Re Lupton [1912] 1 K. B. 107.
- (e) *Ibid.* (2).

TITLE IV — SHARES, STOCKS, AND DEBENTURES

Shares

1638. For the purposes of this Title, a share means an aliquot undivided part, of a specific nominal value, of the capital of an association (not being a partnership as defined in Bk. II, Pt. II, § 584, *ante*), whether incorporated or not,^(a) existing for the purpose of carrying on an undertaking, whether for profit or not, and whether such capital or any part of it, remains uncalled up, or not.^(b) Where the whole of the nominal value represented by the share has been paid, or is deemed to have been paid, into the funds of the association, the share is said to be ‘fully paid’; whether or not any further liability for calls remains upon it.^(c) All shares in companies incorporated under the Companies Clauses Consolidation Act, 1845,^(d) or the Companies (Consolidation) Act, 1908,^(e) are personal estate; and each must be distinguished by an appropriate number,^(f) and registered in the name of the holder in the books of the company.^(g)

(a) It seems quite clear that there may be shares in an unincorporated society, e. g. a building society certified under 6 & 7 Will. IV (1836) c. 32. Such societies are treated as still governed by the provisions of that statute; unless they have been incorporated under later legislation (Building Societies Act, 1894, s. 25 (2)).

(b) *Borland's Trustee v. Steel Bros.* [1901] 1 Ch., at p. 288.

SHARES, STOCKS, AND DEBENTURES 1001

[The definition in the text is, it is submitted, a fair, though not, perhaps, a literal interpretation of the expressions of Farwell, J., in the above case; but neither statute, nor, it is believed, judicial authority, has favoured the public with a formal definition of a 'share.'* In the earlier Companies Acts (e. g. that of 1844, s. 2), great stress was laid on the fact that a share was transferable without the consent of the holders of other shares in the undertaking; and this fact, doubtless, so far as it is true, does very readily distinguish an incorporated company from a private partnership. But, inasmuch as, in the case quoted, Mr. Justice Farwell held, that provisions in a company's articles of association forbidding the transfer of shares to outsiders so long as certain persons connected with the company were willing to purchase, were lawful, and inasmuch as such provisions are now extremely common (being, indeed, expressly recognized by s. 121 of the Companies Act, 1908), the free transferability of shares can hardly be said to be an essential feature of their existence.]

- (c) e. g. where the company is one with unlimited liability.
- (d) *Ibid.*, s. 7.
- (e) *Ibid.*, s. 22 (1).
- (f) Companies Clauses Consolidation Act, 1845, s. 6.
Companies (Consolidation) Act, 1908, s. 22 (2).
- (g) Companies Clauses Consolidation Act, 1845, ss. 8, 9.
Companies (Consolidation) Act, 1908, s. 25.

[Practically speaking, almost all corporations carrying on undertakings for commercial profit, as distinguished from mutual convenience and benefit, are governed by the provisions of one or the other of these last two statutes. Persons may be incorporated for the purpose of trade or otherwise by Letters Patent under the provisions of the Chartered Companies Act, 1837, as amended by the Chartered Companies Act, 1884; but, though such corporations frequently raise capital by shares, the nature and conditions of such shares are usually made the subject of special provisions in the charter of incorporation, and have little in common with ordinary commercial shares. Shares may exist in 'building,' 'provident,' 'industrial,' and similar societies; and such societies are often corporations (Building Societies Act, 1874, s. 9; Industrial and Provident Societies Act, 1893, s. 21). But their so-called 'shares' also bear little analogy to ordinary commercial shares. On the other hand, shares in companies formed by private Acts of Parlia-

* By s. 285 of the Companies (Consolidation) Act, 1908, "share" means "share in the share capital of the company." This effort can hardly be described as a definition.

ment for carrying on public or quasi-public undertakings, e. g. water-works, railways, &c., are very like ordinary commercial shares; being largely regulated by the provisions of the Companies Clauses Act, above referred to. By a recent provision, companies may be authorized to issue share warrants to bearer; with the result that the names of the owners of the shares affected need not appear on the register (Companies (Consolidation) Act, 1908, s. 37).]

‘Preferred’
and ‘de-
ferred’
shares

1639. A ‘preference share’ means a share the holder of which is entitled to participate in the profits of the undertaking in priority to another class or other classes of share-holders;^(a) and a ‘deferred share’ means a share whose holder is postponed, in the distribution of such profits, to another class or other classes of share-holders.^(b) Subject to the terms of its memorandum or articles of association, a company registered under the Companies (Consolidation) Act, 1908, may (*semble*) create preference shares;^(c) but the number of deferred shares created or proposed to be created must be stated in every prospectus issued by or on behalf of such company.^(d)

- (a) The term ‘preference share’ is statutory (Companies Clauses Consolidation Act, 1863, s. 13). It is also familiar in practice, and has been used freely in the Courts. But there would seem to be no authoritative definition of it.
- (b) This expression is also used, though not defined, in s. 81 (a) of the Companies (Consolidation) Act, 1908.
- (c) *McIlquham v. Taylor* [1895] 1 Ch., at p. 60, *per* Stirling, J.
- (d) Companies (Consolidation) Act, 1908, s. 81 (a).

Stock

1640. ‘Stock’ differs from shares in the facts, that (i) subject to the regulations affecting any

particular issue, it may be held and divided into unequal amounts of any extent,^(a) and that (ii) no liability for the subscription of further capital, by calls or otherwise, can exist with regard to it.^(b) Any company registered under the Companies (Consolidation) Act, 1908, may, if so authorized by its articles, convert into stock all or any of its paid-up shares of any denomination;^(c) and any company governed by the provisions of the Companies Clauses Consolidation Act, 1845, may, in manner provided by that Act, convert or consolidate all or any part of the shares then existing in the capital of the company, and in respect whereof the whole money subscribed shall have been paid up, into a capital general stock, to be divided among the shareholders according to their respective interests therein.^(d)

(a) This is the special convenience of stock, that it may be dealt with in any amount, however small (*Ex parte Copeland* (1852) 2 De G. M. & G., at p. 918, *per* Cranworth, L. J.). Of course the term 'stock' is applicable to bodies, no shares in which could possibly be issued, e. g. the Commissioners of the National Debt and the Government of a colony.

(b) That this is the essential feature of stock as distinguished from shares, to which a liability for unpaid calls may attach, may be seen by reference to s. 50 of the Trustee Act, 1893, by virtue of which the expression 'stock' in the statute includes fully paid-up shares.

(c) Companies (Consolidation) Act, 1908, s. 41 (1) (c).

(d) Companies Clauses Consolidation Act, 1845, s. 61.

1641. The legal title to shares and stock in companies governed by the Companies Clauses Consolidation *Transfer*

tion Act, 1845, and the Companies (Consolidation) Act, 1908, and to British Government stock, can be acquired only by transfer registered in the books of the company, or by transfer in the books of the Bank of England respectively.^(a) But a company limited by shares, and registered under the Companies (Consolidation) Act, 1908, may, if so authorized by its articles of association, issue under its common seal a warrant stating that the bearer of the warrant is entitled to any fully paid-up shares or stock therein specified; and such share warrant will entitle the bearer thereof to the shares or stock therein specified, and, on surrendering it for cancellation, to have his name entered as a member in the register of members.^(b)

(a) Companies Clauses Consolidation Act, 1845, s. 15.

National Debt Act, 1870, s. 22.

Companies (Consolidation) Act, 1908, s. 28.

(b) *Ibid.*, s. 37.

[It is impossible to enumerate all the statutes applicable to transfers of different kinds of shares and stock; but the requirement of registration will be found to be universal. As to the form of transfer, legal requirements are much less uniform. The shares of companies governed by the Act of 1845 (*supra*) require a deed (*ibid.*, s. 14); those under the Act of 1908 are transferable 'in manner provided by the articles of the company' (Act of 1908, s. 22 (1)). Government stock may now be made transferable by deed; and no stamp duty is payable thereon (Finance Act, 1911, s. 17). A certificate, under the seal of the company, specifying any shares or stock held by a member, is *primâ facie* evidence of the title of such member to such shares or stock in a company registered under the Companies (Consolidation) Act, 1908 (*ibid.*, s. 23). But the register of members itself is also '*primâ facie* evidence of any matters by this Act directed or authorized to be inserted therein'—which would certainly include the ownership of shares and stock (*ibid.*, s. 33).]

1642. No share in any company governed by the provisions of the Companies Clauses Consolidation Act, 1845, may be transferred, after a call has been made in respect thereof, until such call has been paid, as well as all calls for the time being due on any share held by the intending transferor. *No transfer while calls unpaid*

Companies Clauses Consolidation Act, 1845, s. 16.

[There seems to be no corresponding provision in the Companies (Consolidation) Act, 1908; but such a provision in the articles of association is now assumed unless the contrary appears (Table A, Art. 20). As between the company and the share-holder, the person liable to pay the call is the person whose name was on the register when the call was made (*Re National Bank of Wales* [1897] 1 Ch., at p. 306, *per* Lindley, L. J.). And the transferor of shares upon which a liability for the payment of uncalled up capital remains, may be liable, in the event of the company being wound up within a year of the transfer, to the extent specified in s. 123 of the Act of 1908.]

1643. A good equitable title to shares or stock in companies registered under the Companies (Consolidation) Act, 1908, may be made, whether absolutely or by way of mortgage, by the execution by the alienor of a transfer of the shares or stock without filling in the name of the alienee, and the handing of such blank transfer, and the stock or share certificate, to the alienee. *Blank transfer*

Ex parte Sargent (1873) L. R. 17 Eq. 273.

France v. Clark (1883) 22 Ch. D. 830.

Colonial Bank v. Cady (1890) L. R. 15 App. Ca., at p. 285, *per* Lord Herschell.

Hooper v. Herts [1906] 1 Ch. 549.

Fuller v. Glyn Mills [1914] 2 K. B. 168.

[And if the transferor improperly interferes to prevent the transferee getting himself registered as legal owner, he will be liable in

damages (*Hooper v. Herts, ubi sup.*). It is the unfortunate habit of text-book writers, and even of judges, to speak of a transfer of the kind described in this § as a 'pledge'—a practice which obscures the true nature of the transaction. Doubtless, if the transaction is by way of mortgage, the transferee becomes a pledgee of the documents handed over; but he also acquires title to the shares or stock (*Fry v. Smellie* [1912] 3 K. B. 282). No notice of any equitable interest can, however, be entered on the company's register (Companies [Consolidation] Act, 1908, s. 27).]

Lien for calls **1644.** A company may have a lien on the shares (other than fully paid shares) held by any of its shareholders, in respect of unpaid calls, or other moneys due from such share-holders to the company. In the absence of provision to the contrary in the articles of association of a company registered under the Companies (Consolidation) Act, 1908, such a lien will be deemed to have arisen; and the company may sell the shares after fourteen days' notice, to reimburse itself the moneys due.

Companies (Consolidation) Act, 1908, Sched. I, Table A, Artt. 9–11.

[Similarly, in the absence of special provision, the company may refuse to register transfers of shares on which it has a lien (*Ibid.* Art. 20). The right of the company to forfeit shares for non-payment of calls (which, in the case of companies under the Companies Clauses Act, 1845, is statutory (s. 29)) exists also in the case of companies under the Act of 1908, unless the provisions of Table A are excluded (Table A, Artt. 24–26).]

Definition of debenture **1645.** A debenture, for the purposes of this Title, means an acknowledgment (not necessarily under seal^(a)) of indebtedness by an association, whether in-

incorporated or not,^(b) and whether including a charge on the assets of the association, or not.^(c) Such acknowledgment must be for a specific sum of money; but, if it includes a charge on the assets of the association, such charge may be made to trustees on behalf of a series of debenture holders, or it may be made directly to the holder of the debenture.^(d)

- (a) *B. I. Steam Navigation Co. v. Inland Revenue* (1881) 7 Q. B. D. 165.
- (b) In the last-mentioned case, Grove, J., remarked that he did not "remember the term being used otherwise than in an acknowledgment of indebtedness by a corporate body" (p. 168). But the learned judge admitted that there was no official definition of the term 'debenture'; and, as a matter of fact, 'debentures' are sometimes issued by non-corporate associations. Indeed it is not certain that an individual cannot issue debentures. Even the use of the word 'debenture' is not essential (*Edmonds v. Blaina Furnaces Co.* [1887] 36 Ch. D., at p. 220, *per* Chitty, J.).
- (c) *Edmonds v. Blaina Furnaces Co.*, *ubi sup.*, at p. 219.
Jackson v. Rainford Coal Co. (1896) 2 Ch., at p. 344, *per* Chitty, J.).

[In fact the document decided in *British India Steam Navigation Co. v. Inland Revenue*, *ubi sup.*, contained no charge or agreement to give one.]

- (d) *Re Uruguay, &c. Ry. Co.* (1879) 11 Ch. D. 372.
Re Olathe Silver Mining Co. (1884) 27 Ch. D. 278.

[Where the sum secured by the acknowledgment is an indivisible sum, the security is known as a 'debenture'; where it is a divisible sum which may be held in any quantity not exceeding the total amount owing by the association on the same security, it is called 'debenture stock'.]

1646. Generally speaking, and in the absence of provision to the contrary expressed or implied in its memorandum or articles of association,^(a) an ordinary

Power to issue debentures

trading company has the right to borrow money for the purposes of its business, and to issue debentures therefor.^(b)

(a) *Re General Provident Co.* (1869) 38 L. J. Ch. 320.

[The head note of this report is far too wide.]

(b) *Australian Auxiliary Co. v. Mounsey* (1858) 4 K. & J. 733.
Bryon v. Metropolitan Co. (1858) 3 De G. & J. 123.

[These two cases were expressly followed in *General Auction Co. v. Smith* [1891] 3 Ch. 432, where, however, it was not proposed to issue debentures. Apparently, public undertakings governed by the Companies Clauses Acts have no power to borrow on debentures without express authorization (Companies Clauses Act, 1863, s. 22). Special authority in the memorandum or articles of association is also required for charging uncalled capital (*Re Pyle Works* (1890) 44 Ch. D. 534; *Newton v. Anglo-Australian Invest. Co.* [1895] A. C. 244). 'Reserve capital' (i.e. capital which can only be called up in the event of the association being wound up) cannot be charged by an issue of debentures (Companies (Consolidation) Act, 1908, s. 59; *Re Mayfair Property Co.* [1898] 2 Ch. 28); and the capital of a company limited by guarantee is in a similar position (*Re Irish Club Co.* [1906] W. N. 127). But a company governed by the Companies Clauses Act, 1845, which has power by its special Act to borrow on mortgage or bond, has power to charge its uncalled capital (Act of 1845 s. 38).]

*Floating
charge*

1647. Where debentures comprise a charge on the assets of an association, such charge may be a fixed charge on specific assets, or it may be a 'floating charge' on the assets of the association generally, present and future, or it may comprise both such kinds of charges. A floating charge will become a fixed charge on the assets then actually belonging to

the association, on the occurrence of the event or events agreed upon as fixing the charge.

Governments Stock v. Manila Ry. Co. [1897] A. C., at p. 86, *per* Lord Macnaghten.

Re Yorkshire Woolcombers' Association [1903] 2 Ch., at p. 295, *per* Romer, L. J.

Cox Moore v. Peruvian Corpn. [1908] 1 Ch. 604.

Evans v. Rival Granite Quarries [1910] 2 K. B., at p. 999, *per* Buckley, L. J.

De Beers v. British S. A. Co. [1912] A. C. 52.

[A mere charge, even on specific assets, would only bind such assets in equity, i. e. as against persons acquiring them with knowledge of the charge, and against persons not acquiring the legal title. (*In re Morrison* [1914] 1 Ch. 50.) But, in fact, a debenture trust deed usually comprises a legal conveyance of specific assets. *Inter se*, debenture-holders presumably rank in order of date; unless, as is common though not essential (*Levy v. Abercorris Slate Co.* (1887) 37 Ch. D., at p. 264, *per* Chitty, J.), the debentures are issued in a series, and it is provided that all in the series shall rank *pari passu*. If an earlier series of debentures comprises a floating charge on future-acquired assets, and a later series a specific charge on assets acquired between the two dates, but subject to the rights of the earlier series, the floating charge of the earlier series will, as respects such assets, take priority over the specific charge of the later (*Re Stephenson & Co.* (1912) 107 L. T. 33).]

1648. Debentures issued by companies governed either by the Companies Clauses Act, 1863, or by the Companies (Consolidation) Act, 1908, must be registered in compliance with the terms of those statutes respectively.^(a) Unregistered debentures of the latter class of companies will be void against the liquidator or any creditor of the company.^(b) Any mortgage debenture secured upon land or charges thereon within the meaning of the Mortgage De-

*Registration
of debentures*

benture (Amendment) Act, 1870,^(c) by any company governed by the provisions of the Companies Act, 1908, must be registered with the Registrar of the Land Registry and be duly indorsed by him; otherwise it will not create a charge on the registered securities of the company.^(d)

- (a) Companies Clauses Act, 1863, s. 28. (Apparently, in such cases, the company keeps the register, which is, however, open to inspection by certain classes of persons.)

Companies Act, 1908 s. 93. (In these cases, the register is kept by the Registrar of Joint Stock Companies.)

- (b) *Ibid.* Apparently, in the case of companies governed by the Companies Clauses Acts, there is no penalty for failure to register.

- (c) See s. 4 of that Act for the list of securities included.

- (d) Mortgage Debenture Act, 1865, s. 33. (The company must keep a register of the securities which are registered at the Land Registry as being securities on which it is entitled to raise money by debentures (s. 27).)

*Foreclosure
by debenture-
holders*

1649. Debenture-holders of a company incorporated under the Companies (Consolidation) Act, 1908, having a direct charge (fixed or floating) on the assets of the company, have, in addition to the ordinary remedies of a person having a charge on property (*ante* Sect. IV, Tit. III, § 1423) the right to foreclose the property included in the charge.^(a) But holders of debentures secured by a covering deed in favour of trustees (*ante*, § 1645 n.) are only entitled to a decree for the appointment of a receiver, enquiry as to amounts due to the various classes of debenture-holders, and directions for realization;^(b) and no order for foreclosure can in any case be made,

unless all the debenture-holders entitled *pari passu* demand it.^(c)

- (a) *Welch v. National Cycle Co.* [1886] W. N. 96.
Sadler v. Worley [1894] 2 Ch. 170.

[In the case of a floating charge, Lord Atkinson, in *De Beers v. B. S. A.* [1912] A. C., at p. 70, expressed an opinion adverse to the possibility of foreclosure. And it seems extremely doubtful whether the rule applies to a public undertaking specially authorized by statute; even when carried on by a company incorporated under the Companies Act. At any rate, the Court refused to order a sale in such a case (*Blaker v. Heris & Essex Waterworks Co.* (1889) 41 Ch. D. 399); and it seems quite clear that neither foreclosure, nor sale, nor *semble*, even the appointment of a manager, can be obtained against a company carrying on a public undertaking under the Companies Clauses Act, 1845 (*Gardner v. L. C. & D. R.* (1866) L. R. 2 Ch. App. 201).]

- (b) The proper form of action is by one or more holders on behalf of themselves and the others (see the form in Palmer, *Company Precedents*, I, 1354). The trustees should be made defendants (*Mortgage Insurance Corp'n. v. Canadian Co.* [1901] 2 Ch. 377). In the case of companies issuing debenture stock under the Companies Clauses Act, 1863, the right to a receiver is statutory in certain circumstances (*ibid.* ss. 25, 26).
 (c) *Re Continental Oxygen Co.* [1897] 1 Ch. 511.

1650. Subject to the terms of the debenture, *Enforcement of debentures*
 a debenture-holder is entitled to commence proceedings to enforce his security—(a) when the payment of principal is in arrear,^(a) (b) when it can be proved to be in jeopardy, whether payment is in arrear, or not.^(b)

- (a) *Wallace v. Universal Automatic Machines Co.* [1894] 2 Ch. 547.

[It seems doubtful whether the mere fact that interest is in arrear, is sufficient.]

- (b) *Re Panama Co.* (1870) L. R. 5 Ch., at p. 322, *per* Giffard, L. J.
Hodson v. The Tea Co. (1880) 14 Ch. D. 859.
Re Crigglestone Coal Co. [1906] 1 Ch. 523.

[The most obvious way of proving that the security is in danger is by showing that the association is being wound up. But it is not the only way.]

*Transfer of
debentures*

1651. A mortgage debenture created under the provisions of the Mortgage Debenture Act, 1865, may be transferred by indorsement in the form specified in the Schedule to that Act.^(a) Debenture stock created under the provisions of the Companies Clauses Act, 1863, is transmissible and transferable in the same manner as other stock of the company, and has in all other respects the incidents of personal estate.^(b) A debenture payable to bearer is a negotiable instrument, and passes by delivery, independently of equities.^(c)

(a) Mortgage Debenture Act, 1865, s. 37, Sched. (Form E).

(b) Companies Clauses Act, 1863, s. 23.

(c) *Bechuanaland Co. v. London Trading Bank* [1898] 2 Q. B. 658.
Edekslein v. Schuler [1902] 2 K. B. 145.

[*Semle* : other debentures are transferable in the same manner as choses in action generally (See *post*, Sect. XIV). Would the rule in the text apply to debentures of a private company not dealt with on the Stock Exchange?]

*Redemption
of debentures*

1652. An association which has issued debentures comprising a charge on any part of its assets, may redeem them at any time after the day fixed for pay-

ment of the sums for which the debentures are security ; and any 'clog' on the equity of redemption (*ante*, Sect. IV, Tit. II, § 1415) will be void.^(a) But a debenture issued by a company registered under the Companies (Consolidation) Act, 1908, may, by its express terms, be made irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long.^(b)

- (a) *Samuel v. Jarrah Corporation* [1904] A. C. 323.
British S. Africa Co. v. De Beers [1910] 2 Ch. 502.

[Some doubts were thrown on the applicability of the doctrine of 'clog' to debentures creating only a floating charge, in the House of Lords on the hearing of the appeal in the *De Beers Case* ([1912] A. C., at p. 70, *per* Lord Atkinson, at p. 71, *per* Lord Halsbury, at p. 73, *per* Lords Loreburn and Gorell). Lord Atkinson, however, based his doubt at least partly on the argument that a debenture-holder had no right of foreclosure — an argument inconsistent with decided cases (*ante*, § 1649) ; and the Court of Appeal, in *Kreglinger v. New Patagonia Co.* (1913) XXIX T. L. R. 464, considered itself bound by the earlier decisions to hold that the doctrine of the 'clog' applied to a floating charge. On appeal to the House of Lords, that decision was reversed, but without reference to the applicability of the doctrine ([1914] A. C. 25).]

- (b) Companies (Consolidation) Act, 1908, s. 103.

1653. Notwithstanding the provisions of Bk. II, Pt. II, Sect. III, Tit. II, § 444, *ante*, a contract with a company registered under the Companies (Consolidation) Act, 1908, to take up and pay for any debentures of the company, may be enforced by an order for specific performance.

*Contract
to take up
debentures*

Companies (Consolidation) Act, 1908, s. 105.

[Generally speaking, a contract to lend or borrow money is not specifically enforceable; and this doctrine was applied to a contract to take up debentures (*S. A. Territories v. Wallington* [1908] A. C. 309). The change in the law indicated in the text was made by the Companies Act, 1907, s. 16.]

Scrip

1654. A 'scrip certificate' is a written acknowledgment by the promoters of a company, or undertaking, or loan, of the right of the person named in it, or the holder of the certificate, to a specified number or amount of shares, stock, or debentures. Such certificate may be either absolute, or conditional upon some event happening ('provisional certificate'). Where the certificate is in favour of the 'holder,' the benefit of such certificate is legally transferable by mere delivery of the certificate.

Barclay's Case (1859) 26 Beav. 177.

Mexican and South African Co. (1859) 4 De G. & J. 544.

[Generally speaking, 'scrip' is a temporary arrangement, only resorted to during the formation of a company, or the flotation of stock, loans, or debentures; and it is doubtful whether 'scrip-companies' — i. e. so-called companies the bulk of whose members never actually take up their shares, would not be ordered to be wound up under s. 129 (vi) of the Companies Act, 1908 (*Princess of Reuss v. Bos* (1871) L. R. 5 H. L., at pp. 201–2, *per* Lord Cairns). The important point is, of course, that a mere scrip-holder cannot, except in special circumstances, be made a contributory in the winding up of the company (*Ormerod's Case* (1867) L. R. 5 Eq. 110). It is stated generally in Lindley on *Companies* (6th ed., p. 650), that scrip is transferable by delivery of the certificate. But the cases quoted were concerned with certificates to 'holder.']

TITLE V—PATENTS AND DESIGNS

1655. A patent, for the purposes of this Title, means the exclusive right of making, using, exercising, and vending a manufacture new within the realm.^(a) Such a right can only be granted to the true and first inventor or inventors of such manufacture, and for a period not exceeding sixteen years ;^(b) but, in the discretion of the Court, the period may be extended for a further time not exceeding ten years.^(c) All other monopolies of buying, selling, making, and working, or using anything within the realm, and all other monopolies of any kind, are, unless authorized by Act of Parliament, utterly void.^(d)

*Definition
of patent*

- (a) i. e. within the United Kingdom and the Isle of Man (*Brown v. Annandale* (1842) 8 Cl. & F. 437 ; Patents and Designs Act, 1907, s. 14).
- (b) Statute of Monopolies (1623) ss. 1, 6.
Patents and Designs Act, 1907, s. 17 (1) ; 1919, s. 6.
- (c) Act of 1919, s. 7. (The extension is usually only for five years ; but 'in exceptional cases' it may be up to ten, *ibid.* (2). A patent may be extended as to one or more of its clauses (*Re Lodge's Patent* [1911] 2 Ch. 46)).
- (d) Statute of Monopolies (1623) s. 1.

[The granting of patents was, at one time, subject to much abuse; and the matter roused great feeling, which finally found its expression in the statute of 1623. This statute is still in force as the basis of patent law; and the definition of 'invention' is, in the latest legislation (Act of 1907, s. 93) still incorporated by reference to it. But a somewhat careless judicial interpretation of the permissive clause of the old statute (s. 6) led to further abuses, which

have been recently remedied by the provision set out in § 1660 (iii) *post*. In theory, a patent is a privilege voluntarily granted by the favour of the Crown (Act of 1907, s. 97). In fact, it is claimable as of right by any applicant who fulfils the prescribed conditions (Act of 1907, ss. 1—13), as amended by s. 5 and Sched. of Act of 1919).

*Infringe-
ment of
patent*

1656. The owner of a lawful patent ('patentee') has a *prima facie* right to recover damages, or to have awarded in his favour an injunction against future infringements, against any person who infringes his monopoly, within the United Kingdom and the Isle of Man.^(a) But where a defendant proves that, at the date of the infringement, he was not aware, and had no reasonable means of making himself aware, of the existence of the patent, the patentee will not be entitled to recover damages in respect of the infringement.^(b)

- (a) Patents and Designs Act, 1919, s. 10. (Since the passing of the Chancery Amendment Act, 1858, the patentee has been able to obtain all his remedies in a single action. Before the passing of the Patents Act, 1919, the patentee could also ask for an account of his rivals' sales, with a view to claiming the profits; and it is not quite clear that the Court may not, even now, award him this remedy in the exercise of its discretion.)

[It has previously been pointed out (*ante*, Bk. II, Pt. III, Sect. III, Tit. IV. § 891 n.) that a threat of an action for infringement, not duly followed up, is itself a ground of action by any person aggrieved (Act of 1907, s. 36).]

- (b) Patents and Designs Act, 1907, s. 33.

*Definition
of infringe-
ment*

1657. Any unlicensed making,^(a) using,^(b) or selling^(c) of a patented article, or any other act which in fact makes use of the invention protected by the

patent,^(d) is, *primâ facie*, an infringement of such patent.

(a) *Sykes v. Howarth* (1879) 12 Ch. D. 826.

[The making must be for use or sale, not merely for experiment (*Frearson v. Loe* (1878) 9 Ch. D., at pp. 66-67, *per* Jessel, M. R.).]

(b) *Nobel's Explosives Co. v. Jones* (1881) 17 Ch. D., at p. 741, *per* James, L. J.

Saccharin Co. v. Jackson (1903) 20 R. P. C. 611.

(c) Mere exposure for the purposes of sale is sufficient to amount to an infringement (*British Motor Syndicate v. Taylor & Sons* [1901] 1 Ch. 122).

(d) *Nobel's Explosives Co. v. Anderson* (1894) 11 R. P. C., at p. 128, *per* Romer, J.

1658. A patent binds the Crown to the same extent as it binds a subject; except that any Government department may use the invention protected by it on such terms as may be agreed, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, on such terms as the Treasury may settle, after hearing all parties interested, and that, where an invention has been recorded or tried by or on behalf of a Government department, such invention may be used by the Crown without license or royalty, unless it was in fact communicated by the patentee.

Patent binds Crown

Patents and Designs Act, 1919, s. 8.

1659. A patentee may grant licenses to any persons to exercise his invention; ^(a) and such persons will

Licenses

not, whilst acting in accordance with the terms of such licenses (express or implied), be guilty of infringing the payment. ^(b)

- (a) There seems to be no statutory authority for this proposition ; but it is implied throughout the Acts.
- (b) Certain conditions cannot be included in licenses (Patents and Designs Act, 1907, s. 38). And a license to sell, or a sale by a patentee, includes an implied license to the purchaser to sell again (*Mc Gruther v. Pitcher* [1904] 2 Ch., at p. 312, *per* Cozens-Hardy, L. J.).

[Any patent may, at the request of the patentee, be indorsed "licenses as of right"; and then any person can demand a license on terms to be settled by the Comptroller. The holder of a patent so indorsed only pays half renewal fees (Act of 1919, s. 2).]

*Revocation
of patent*

1660. A patent may also be revoked on one or more of the following grounds, viz.:—

- (i) that it was granted, in the first instance, for an invention not satisfying the requirements of the Statute of Monopolies, or to a person not entitled to the grant;

Patents and Designs Act, 1907, s. 25 (3).

- (ii) that it was irregularly obtained;

Nuttall v. Hargreaves [1892] 1 Ch. 23.

- (iii) that there has been an abuse of the rights granted thereby.

Patents and Designs Act, 1919, s. 1.

[Such an abuse is deemed to have taken place when, after four years from its date, the patent is not being worked on a commercial

scale in the U. K., or such working is being hindered by importation of the article by the patentee or with his connivance, or the demand for the article in the U. K. is not being fairly met, or if licenses are being unfairly withheld or granted only on unreasonable terms (*ibid.*). But the Comptroller need not take the extreme step of revoking the patent. He may order it to be subject to "licenses as of right" (*ante*, § 1659, n.), or may order a license to be granted to the applicant on terms as to raising capital for development, &c. (*ibid.*). Generally speaking, an objection to the validity of a patent, or a claim for its revocation, may be taken or made either as a defence to an action for infringement (Act of 1907, s. 25), or by petition to the Court (*ibid.*), or by application to the Comptroller (*ibid.*, s. 26), subject to an appeal to the Court (*ibid.*, ss. 26 (4), 27; Act of 1919, s. 1).]

1661. A patent lapses if the patentee fails to pay *Lapse of*
the prescribed fees within the prescribed times: (a) *patent*
but, if the failure to pay was unintentional,^(b) the patent may be restored by the Comptroller on the application of the patentee, after due notice to the public, and with due protection to persons who may have availed themselves of the subject-matter of the patent after it was announced as void in the Official Journal.^(c)

(a) Patents and Designs Act, 1907, s. 17 (2).

(b) *Ibid.* s. 17 (3).

Re Land's Patent [1910] 2 Ch. 236.

[The Act merely requires that the application shall state that the non-payment was unintentional. But the decision covers the view in the text.]

(c) Patents and Designs Act, 1907, s. 20 (5); 1919, Sched.

1662. (*Seemle*) the legal title to a patent can only *Assignment*
be assigned by deed. But an equitable assignment of *of patent*

a patent, being in writing, may be entered on the Register of Patents.

Re Casey's Patents [1892] 1 Ch. 104.

[It seems curious that the Act is silent on the form of assignment; and the expression of opinion by the Court in the case quoted was really *obiter* as regards the first proposition in the §. The Register is only *primâ facie* evidence of title (Patents and Designs Act, 1907, s. 28 (3)); but proprietors, mortgagees, and licensees must now register their titles, though unregistered equitable rights may still be enforced, on equitable principles (Act of 1919, s. 16).]

Design

1663. A 'design,' as referred to in this Title, means a new and original design for the pattern, shape, configuration, or ornament, or for any two or more of such purposes, of any article of manufacture or substance (not being a design for a sculpture within the protection of the Copyright Act, 1911 (*post*, Tit. VII)), which design is registered under the provisions of the Patents and Designs Act, 1907.

Patents and Designs Act, 1907, ss. 49, 93.

[The fact that the design has been confidentially disclosed and subsequently published in breach of good faith before registration, and even the acceptance of a first and confidential order for goods bearing a *textile* design intended for registration, will not be fatal to the application to register (*ibid.* s. 55). Neither will the fact that the design, or goods made from it, has or have been exhibited at a certified industrial exhibition; if due notice of the applicant's intention to exhibit has been given to the Comptroller of Patents, and the application for registration has been made within six months of the opening of the exhibition (*ibid.* s. 59).]

1664. Such registration confers in the first instance copyright in the design for a period of five years from its date ; and such copyright will, on due application and payment of the prescribed fees, be renewed for a second and third period of five years. *Effect of registration*

Ibid. s. 53.

[The applications for registration and renewal are made to the Comptroller of Patents, subject to an appeal to the Board of Trade (*ibid.* s. 49).]

1665. During the existence of such copyright, or such shorter period (not being less than two years from the date of registration) as may be prescribed, the design is not open to inspection by the public ; but any person furnishing sufficient information to enable the Comptroller of Patents to identify the design, and paying the prescribed fee, is entitled to be informed whether registration still exists, and in respect of what classes of goods, and of the date of registration, and of the name and address of the proprietor of the design. *Protection of registered design*

Ibid. ss. 56, 57.

1666. If, during the existence of such copyright, any person (*semble*, within the United Kingdom or the Isle of Man), except with the license or written consent of the registered proprietor of the design, for the purposes of sale applies, or causes to be applied, to *Infringement of design*

any article in any class of goods in respect of which the design is registered, the design itself or any fraudulent or obvious imitation thereof, or if, knowing that any such design or imitation has been applied without the consent of the registered proprietor of the design, any person publishes or exposes, or causes to be published or exposed [for sale, such article, such person will be liable to pay to such registered proprietor a sum not exceeding £50, recoverable as a simple contract debt, or, at the option of the registered proprietor, to an action for damages and an injunction.

Ibid. s. 60.

But:—

- (i) the total sum recoverable as a simple contract debt in respect of any one design will not exceed £100;

Ibid.

- (ii) the registered proprietor will not be able to recover any penalty or damages in respect of a breach of copyright of such design, unless he has caused (or shows that he took all proper steps to ensure such result) each article delivered by him on sale, to which such design has been applied, to be marked with the prescribed mark, words, or figures, denoting that such design is registered, or unless he shows that the infringement in question was committed after the infringer

knew, or had received notice, of the existence of the copyright in such design.

Ibid. s. 54.

[The provision as to 'threats actions' applicable to patents (*ante*, § 1656, n.), is applicable also to registered designs (s. 61); and registration may be cancelled at any time by the Comptroller, subject to appeal, on the ground that the design is not used for manufacture in the United Kingdom to a reasonable extent, though it is so used abroad, or on the ground that the design had been published in the U. K. before registration (Act of 1919, s. 14).]

1666A. A registered design binds the Crown in the same manner as a subject. But the provisions of § 1658 (*ante*), with regard to user of patents by Government departments, apply also to registered designs. *Rights of Crown*

Patents and Designs Act, 1919, s. 15.

1667. *Semble*, the proprietorship of a registered design may be assigned by deed, writing, or word of mouth;^(a) but the assignee cannot sue in respect of alleged infringement of the design, until he is entered as proprietor on the Register of Designs.^(b) *Transfer of design*

- (a) There is nothing in the statute or rules requiring the assignment to be in any particular form; but, possibly, the provisions of the Judicature Act, 1873, s. 25 (6) (*post*, Sect. XIV, Tit. I, § 1698), may by implication require a writing.

- (b) *Woolley v. Broad* [1892] 1 Q. B. 806.

TITLE VI—TRADE MARKS, TRADE NAMES, AND GOODWILL

Trade mark **1668.** A trade mark, for the purposes of this Title, means any distinctive device, sign, or badge, used or proposed to be used upon or in connection with goods, for the purpose of indicating that such goods are the goods of the proprietor of such device, sign, or badge, by virtue of manufacture, selection, certification, dealing with, or offering for sale.

Trade Marks Act, 1905, s. 3.

Registration of trade marks **1669.** A trade mark which satisfies the requirements of the Trade Marks Act, 1905-19, may be registered in the Register of Trade Marks at the Patent Office. Such mark is then known as a 'registered trade mark.'

Ibid. ss. 3, 4, 12-18.

[The qualifications of a registrable trade mark are set out in ss. 8-11 of the Act of 1905. The chief requirements are that it must be (i) applicable only to particular goods or classes of goods, (ii) distinctive (identical or closely resembling trade marks cannot be registered (s. 19)), (iii) not deceptive, immoral, or scandalous. A trade mark may be limited to one or more colours; but, in the absence of express limitation, it will be deemed to apply to all colours (s. 10). There is an attempt in the Act (s. 9) to set out the alternative forms, one of which a registrable trade mark must assume; but the definitions are so wide as to include almost every possible form, except a name or signature to which the applicant is in no way

entitled, and ordinary words which have a direct reference to the character or quality of the goods, or are in their ordinary signification geographical names or surnames (*Uneda Trade Mark* [1901] 1 Ch., 550; *affd.* on appeal). 'Invented words' are expressly authorized (s. 9 (3)); and an applicant's own name may, in certain circumstances, be sufficiently distinctive to be registered (*Teofani Co. v. Teofani* [1913] 2 Ch. 545). But letters of the alphabet, at any rate unless they are of a peculiarly distinctive character, cannot be registered as a trade mark (*Re Du Cros* [1913] A. C. 624). By the amending Act of 1919, "any" mark may be registered in Part B of the Register, if it has been *bonâ fide* used in the U. K. for two years by its alleged proprietor; and such registration is *primâ facie* evidence of the exclusive right of the registered proprietor to the user of the mark (ss. 1—4).]

1670. The registration of a trade mark operates for a period of fourteen years, and may be renewed from time to time for a similar period before the expiration of the previous renewal.^(a) During the continuance of any such period, the proprietor of a valid registered trade mark ^(b) has the exclusive right to the use, in the United Kingdom and the Isle of Man,^(c) of such trade mark, upon or in connection with the goods in respect of which it is registered; and (*semble*) in the case of any infringement of his exclusive right by another person, may bring an action for damages or an account and an injunction, in the same way as for any other tort of the like nature.^(d)

*Renewal of
registration
and remedies*

(a) Trade Marks Act, 1905, ss. 28, 30.

[When a trade mark has been allowed to lapse, it may be re-registered at any time within a year from its removal from the register; unless the Registrar is satisfied that there has been no *bonâ fide* user of it during the two years immediately preceding the removal (s. 31).]

(b) The validity of a trade mark may be disputed either (i) on the application to register (s. 14), or (ii) in an action for infringement,

L L 2

or (iii) on a special application for removal from the register (s. 35). But registration is *primâ facie*, and, after seven years (except where it has been obtained by fraud or the mark is immoral or scandalous) conclusive evidence of validity (ss. 40, 41); and, where the validity of a registered trade mark has been unsuccessfully impeached in legal proceedings, the Court may grant a certificate of validity which, in subsequent proceedings alleging invalidity of that mark, will entitle the proprietor, if successful, to full costs as between solicitor and client (s. 46). No trade mark registered prior to 11th August, 1905, which would be registrable under the Act of 1905, can be removed on the ground that it was not properly registrable under the Acts in force at the date of its registration (s. 36).

(c) Trade Marks Act, 1905, s. 70.

(d) *Ibid.* s. 42. (But no damages or account will be awarded unless fraud on the part of the defendant is proved (*Slazenger v. Spalding* [1910] 1 Ch. 257).)

[The Act is singularly reticent on the subject of infringement; but, presumably, any breach of the rights conferred by the Act would be a tort, and, as such, would entitle the proprietor to the usual remedies for a tort. As regards marks registered in Part B, no relief is to be granted "in respect of such registration," against user not calculated to deceive (Act of 1919, s. 4).]

*User of own
name, etc.*

1671. No registration under the Trade Marks Act, 1905, will interfere with any *bonâ fide* use by a person of his own name or place of business, or that of any of his predecessors in business, or the use by any person of any *bonâ fide* description of the character or quality of his goods.

Trade Marks Act, 1905, s. 44.

[For a similar point in connection with 'passing off' cases, see *post*, § 1675.]

*Removal
from register*

1672. A trade mark may be removed from the register on the application of any person aggrieved, on the ground that it was not properly capable of registration, or on the ground that it was registered

by the proprietor or a predecessor in title without any *bonâ fide* intention to use it in connection with such goods, or that there has in fact been no such *bonâ fide* user within five years prior to the application.

Trade Marks Act, 1905, ss. 35, 37.

[In the latter case, the application may be defeated by showing that the non-user is due to special circumstances in the trade (*ibid.*).]

1673. A registered trade mark is assignable and transmissible only in connection with the goodwill (*post*, §§ 1676–1680) of the business concerned in the goods for which it has been registered; and it determines with such goodwill.^(a) The assignee or other acquirer of the trade mark is entitled to be registered as proprietor, on proving his title to the satisfaction of the Registrar; ^(b) and he cannot (without leave of the Court) give any documentary transfer in evidence, unless it has been registered.^(c) *Transfer of trade mark*

(a) *Ibid.* s. 22.

[Upon a dissolution of partnership, or withdrawal from business, of a registered proprietor, the Registrar may, subject to an appeal to the Board of Trade, sanction the apportionment of his registered trade marks (s. 23).]

(b) *Ibid.* s. 33.

[No special form of assignment is, apparently, prescribed, either by the Act or the Rules. But no trust can be registered (s. 4).]

(c) Trade Marks Act, 1919, s. 11.

1674. No person may take any proceedings to prevent, or recover damages for, any infringement of an unregistered trade mark; other than a trade mark *Unregistered trade marks*

in use before 13th August, 1875, which has been refused registration under the Trade Marks Act, 1905.

Trade Marks Act, 1905, s. 42.

[The date is, of course, that of the passing of the Trade Marks Act, 1875, which first gave statutory recognition to trade marks. The history of trade marks is one of the clearest examples of the way in which an equitable jurisdiction for the prevention of fraud gives rise to new forms of property. For the most part, the statutory provisions adopted the rules evolved by the Court of Chancery; but, obviously, not entirely, otherwise the old trade marks could have been registered under the statute. Leading cases are *Leather Cloth Co. v. American Leather Co.* (1865) H. L. C. 523; *Liebig's Extract of Meat Co. v. Hanbury* (1867) 17 L. T. 298; and *Raggett v. Findlater* (1873) L. R. 17 Eq. 29 ('nourishing stout'). But the subject is not of sufficient interest to warrant detailed treatment.]

'Passing off'

1675. Independently of the proprietorship of any trade mark, a person whose name, description, signs, labels, or goods is or are imitated so closely by a rival in business as to lead the public to believe that it is purchasing such person's goods, is entitled to take proceedings to stop such imitation, and for an account of profits or for damages.^(a) It is not necessary for him to prove that the defendant's conduct was, in fact, fraudulent.^(b) (*Semble*) the mere use of the defendant's own name cannot amount to a 'passing off.'^(c)

(a) *Thompson v. Montgomery* [1891] A. C. 217.

Reddaway v. Banham [1896] A. C. 199.

Powell v. Birmingham Vinegar Co. [1896] 2 Ch. 54.

[The right to take such proceedings is expressly reserved by the Trade Marks Act, 1905, s. 45. Even the fact that a patent once

held by the plaintiff for the goods in question has been revoked, will not, necessarily, be fatal to a 'passing off' action (*Edge v. Nicolls* [1911] A. C. 693.).]

- (b) *Millington v. Fox* (1838) 3 Myl. & Cr. 338.
Saxleburn v. Apollinaris Co. [1897] 1 Ch. 893.
Bourne v. Swan & Edgar, Ltd. [1903] 1 Ch. at p. 227, *per* Farwell, J.

[It would appear that, where the defendant has not been guilty of fraud, no account or damages will be awarded against him (*Edelsten v. Edelsten* (1863) 1 De G. T. & S., at p. 199, *per* Lord Westbury, C, followed by Lord Blackburn in *Singer Manfg. Co. v. Long* (1882) L. R. 8 App. Ca., at p. 31).]

- (c) *Burgess v. Burgess* (1853) 3 De G. M. & J. 896.
Turton v. Turton (1889) 42 Ch. D. 128.
Brinsmead v. Brinsmead (1913) XXIX T. L. R. 706 (C. A.).

[There is a considerable difference on the last point between an individual and a corporate defendant. Inasmuch as a corporation's name is artificially acquired, it is much easier to persuade the Court that it has been adopted or used for unfair objects than in the case of a birth name (*Brinsmead v. Brinsmead (Limited)* (1896) XIII T. L. R. 3 (C. A.); *Kingston, Miller & Co. v. Kingston & Co.* [1912] 1 Ch. 575). But where a patent has expired, even if the patented article has been sold under a specific description (not containing the plaintiff's name), the plaintiff cannot prevent the sale of it by rivals under the same description (*Linoleum Co. v. Nairn* (1878) 7 Ch. D. 835). And an attempt to do so by registering the description as a trade mark will be defeated (*Re Ralph* (1883) 25 Ch. D., at p. 199, *per* Pearson, J.; *Magnolia Metal Co.* [1897] 2 Ch. 371; *Re Gestetner* [1908] 1 Ch. 513; Trade Marks Act, 1919, s. 6 (1)).]

1676. The goodwill of a business or undertaking Goodwill
 is the benefit of the trade connection, and other incidental advantages, of such business or undertaking.^(a)
 Goodwill may exist apart from any site or buildings.^(b)

- (a) *Potter v. Commissioners of Inland Revenue* (1854) 10 Exch. 147.
Churton v. Douglas (1859) Johns. 174.
Trego v. Hunt [1896] A. C. 7.

[It must, of course, be remembered, that the acquisition of goodwill does not of itself include the current rights and liabilities of the business.]

- (b) This was for some time doubted, owing to a definition by Lord Eldon in *Cruttwell v. Lye* (1810) 17 Vesey, at p. 346. But, while it is obvious that the goodwill of certain businesses, e. g. a publican's, would have little value apart from the premises on which they were conducted, it is equally clear that the value of the goodwill of others, e. g. a newspaper or a professional practice, is largely independent of the precise buildings in which they may hitherto have been carried on. This fact is fully recognized by the cases quoted above.

['Goodwill' may be regarded as property at its vanishing point; for it is clear that the purchaser of 'goodwill' can neither (a) compel the customers of the former proprietor to continue to deal with him, nor (b) prevent strangers, or even (subject to §§ 1678, 1679) the vendor, competing with him for the business of such customers. Nevertheless, the importance of established custom and habit in business affairs is so great, that large sums of money are constantly paid for the mere chance of securing the consequences of them. The Court of Exchequer was, therefore, merely recognizing facts, when it definitely decided, in *Potter v. Inland Revenue*, *ubi sup.*, that goodwill was 'property'.]

Right of purchaser to use name of vendor

1677. The voluntary sale of the goodwill of a business entitles the purchaser to use the name or style of such business so long as it is carried on by him.

Levy v. Walker (1879) 10 Ch. D. 436.

Burchall v. Wilde [1900] 1 Ch. 551.

Townsend v. Farman [1900] 2 Ch. 698.

[The purchaser must not, however, use the vendor's name in such a way as to expose the vendor to personal liability (*Thynne v. Shove* (1890) 45 Ch. D. 577).]

Soliciting customers of old business

1678. The voluntary vendor of the goodwill of a business will not be allowed to solicit the customers of such business, and will be restrained from doing any

acts which will enable him to do so.^(a) But he cannot, in the absence of express agreement,^(b) be restrained from carrying on a similar business on his own account;^(c) and a bankrupt, the goodwill of whose business has been sold by his trustee without his concurrence, may both carry on a rival business and solicit his old customers.^(d)

- (a) *Trego v. Hunt* [1896] A. C. 7.
Gillingham v. Beddow [1900] 2 Ch. 242.
Curl v. Webster [1904] 1 Ch. 685.

[A person who enters into partnership on the terms that the goodwill of the business shall belong to the other partners, is in the same position as a vendor for this purpose (*Trego v. Hunt*, *ubi sup.*). *Curl v. Webster* shows that, even after the old customers have voluntarily returned, he must not solicit them.]

- (b) And, of course, any such agreement will be 'in restraint of trade,' and, as such, only valid if it is reasonable (*ante*, Bk. I, § 96).
(c) *Churton v. Douglas* (1859) Johns. 174.
Johnson v. Helleley (1864) 2 De G. J. & S. 446.
(d) *Cruttwell v. Lye* (1810) 17 Ves. 335.
Walker v. Mottram (1881) 19 Ch. D. 355.
Jennings v. Jennings [1898] 1 Ch. 378.

1679. The voluntary vendor of the goodwill of a business will also be prevented from using the name or style of such business in any competing business carried on by him; even when such name or style is, or comprises, his own individual name. *Vendor using old name*

- Churton v. Douglas*, *ubi sup.*
Pomeroy v. Scalé (1907) XXIII T. L. R. 170.

1680. In the dissolution of a partnership by the Court, the value of the goodwill of the business will always be taken into account. *Value of goodwill*

- Hill v. Fearis* [1905] 1 Ch. 466.

TITLE VII.—COPYRIGHT

*Literary
copyright*

1681. Copyright in a literary work means, for the purposes of this Title, the sole right (i) to multiply and publish copies, whether written or printed, and whether in the original tongue or a translation, of the whole or any substantial part of any book, pamphlet, handbill, map, chart, plan, table, compilation, or other document intended by the author to convey its meaning wholly or mainly by the use of words or abbreviations of or symbols for words, whether accompanied by drawing or colouring, or not, and having an original character, (ii) to make any record or other contrivance by means of which the work may be mechanically performed or delivered, (iii) in the case of a lecture, address, speech, or sermon, also to deliver it, either orally or by means of any mechanical instrument, in public, (iv) to convert the work into a dramatic work by way of performance in public, or otherwise, and (v) to authorize any of the above acts.

Copyright Act, 1911, ss. 1 (2), 35 (1).

[This and the following three §§ are an attempt to separate and distinguish between several species or forms of copyright, which, to the confusion of the reader, are mixed up, in an ambitious effort towards brevity, in s. 1 (2) of the Copyright Act, 1911.]

1682. Copyright in a dramatic work means, for the purposes aforesaid, the sole right (i) to perform, or authorize the performance of, the whole or any substantial part of any dramatic work, including a play, recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and also any cinematograph production where the arrangement or acting form or the combination of incidents represented gives the work an original character, (ii) to convert it, or authorize it to be converted, into a novel, or other non-dramatic work, and (iii) to make or publish, or authorize to be made or published, copies of such dramatic work. *Dramatic copyright*

Ibid.

1683. Copyright in musical work means, for the purposes aforesaid, the sole right (i) to perform, and to authorize the performance of, in public, the whole or any substantial part of a musical work, (ii) to multiply and publish, and to authorize the multiplication and publication of, copies of the score, and (iii) to make, or authorize the making of, any record, perforated roll, or other contrivance by means of which such work may be mechanically performed or delivered. *Musical copyright*

Ibid.

[*Semble*: there is no definition of 'musical work' in the Act of 1911; but there is an attempted definition in section 3 of the Musical (Summary Proceedings) Copyright Act, 1902, which is not repealed by the Act of 1911.]

*Artistic
copyright*

1684. Copyright in artistic work means, for the purposes aforesaid, the sole right to reproduce and multiply, and to authorize the reproduction and multiplication of, copies of the whole or any substantial part of any work of painting, drawing, sculpture, or artistic craftsmanship, or of any architectural work of art, engraving or photograph. But, as regards an architectural work of art, copyright does not extend to processes or methods of construction.

Copyright Act, 1911, ss. 1 (2), 35 (1).

*Duration of
copyright*

1685. Copyright exists during the life of the author of a work and fifty years after his death; whether the work has or has not been published in his lifetime.

Ibid. ss. 3, 31.

But: —

- (i) in the case of a work of joint authorship, the copyright lasts during the life of the joint author who dies first, and fifty years afterwards, *or* during the life of the joint author who dies last, whichever period is the longer;

Ibid. s. 16 (1).

- (ii) in the case of a literary, dramatic, or musical work, or an engraving, wherein copyright existed at the death of its author (or, in the case of joint authorship,

at or immediately before the death of the author who died last), but which has not been published or performed in public (or, in the case of a lecture, delivered in public) before such death, the copyright will last until publication, or performance or delivery in public, and for fifty years afterwards ;

Ibid. s. 17 (1).

[Ownership of the MS. of an unpublished, unperformed, or undelivered work, acquired by testamentary disposition of the author, is *primâ facie* evidence of ownership of the copyright (*ibid.* (2)).]

(iii) in the case of photographs, and of contrivances by which sounds may be mechanically reproduced, copyright will last for fifty years from the making of the original negative or plate from which the photograph or contrivance was directly or indirectly derived ;

Ibid. ss. 19 (1), 21.

[In other respects, perforated rolls, &c. rank as 'musical works,' and enjoy the protection of copyright (*ibid.*).]

(iv) in the case of works in which copyright existed on the 30th June, 1912, the existing copyright is converted into the copyright described in this Title, except that, where the owner was not at such date entitled (in the case of musical or dramatic works) to performing right, he

does not obtain the sole right to perform the work or any part thereof in public; and that where the owner of the performing right was not, at such date, entitled to the copyright, he continues to keep the sole right of public performance for the extended period, but does not get the other advantages of copyright.

Copyright Act, 1911, s. 24 and Sched. I.

*Title to copy-
right*

1686. The copyright in any work belongs, in the first instance, to the author or his representatives.^(a) The owner of copyright may assign it, wholly or partially, by written assignment, signed by himself or his duly authorized agent.^(b) But, when the author of a work is the first owner of the copyright therein,^(c) no assignment by him (other than an assignment by testament) will be operative to vest in the assignee any rights beyond the expiration of twenty-five years from the author's death; and the reversionary interest expectant on the termination of that period will, notwithstanding any agreement to the contrary, but subject to § 1687, devolve on (the author or^(d)) his personal representatives as part of his estate.^(e)

(a) *Ibid.* s. 5 (1).

(b) *Ibid.* s. 5 (2). Assignment in writing clearly includes a testamentary disposition.

(c) It is rather difficult to see how, under the Act, any one but the author could be the first owner of the copyright; except where the work is made in the course of the author's employment under a contract of service or apprenticeship (s. 5 (1) (b)).

- (d) Presumably, the reversionary interest actually belongs to the author; though any assignment of it by him (other than testamentary) would be ineffectual.
- (e) Copyright Act, 1911, s. 5 (2).

1687. Where a copyright was in existence immediately before the 1st July 1912, but was not vested in the author of the work, the owner does not, under the Copyright Act, 1911, acquire any extension of the copyright; but, at the date when, but for the passing of the Copyright Act, 1911, it would have expired, the copyright will pass to the author or his personal representatives for the residue of the period described in § 1685 (iv) *ante*. But the owner of the copyright on the 1st July, 1912 (or his successors in title) has, on giving the prescribed notice, the right of pre-emption for such extended period, or the right of production during such extended period, on terms to be settled by agreement or arbitration, and the right to be compensated for any unexhausted expenditure or liability incurred, before 26th July, 1910, in connection with the reproduction or performance of such work in a manner which at the time was lawful, or with a view to its reproduction or performance at a time when such reproduction or performance would, but for the passing of the Copyright Act, 1911, have been lawful.

*Existing
copyright*

Ibid. s. 24.

1688. Where in the case of an engraving, photograph, or portrait, the plate or other original was

*Work done
order*

ordered by some person other than the author, and made for valuable consideration in pursuance of such order, the person giving such order will (in the absence of agreement) be the first owner of the copyright; and, in any other case, where the work was made by the author in the course of his employment as a servant or apprentice, the employer will (in the absence of agreement) be the first owner of the copyright.

Copyright Act, 1911, s. 5 (1) (a) and (b).

[The section seems to assume that an article or other contribution contributed to a 'newspaper, magazine, or similar periodical' will not become the copyright of the proprietor of the periodical, unless the contributor was servant or apprentice; for it gives the contributor a right to prohibit its reproduction in separate form. If this is a correct view, the Act has substantially altered the law as laid down in *Lawrence v. Aflalo* [1904] A. C. 17, which was, however, a case of an encyclopædia, not of a periodical. There is no definition of an 'author' in the statute; but the translator of a work is the 'author' of the translation (*Byrne v. Statist Co.* [1914] 1 K. B. 622).]

*Infringement
of copyright*

1689. An infringement of copyright is committed by any person who, without the consent of the owner of the copyright:—

- (i) does any act which such owner has, by virtue of the Copyright Act, 1911, sole right to do (§§ 1681–4 *ante*); or,
- (ii) does any of the following acts, viz.:—
 - (a) sells or lets for hire, or by way of trade exposes or offers for sale or hire,
 - (b) distributes, either for purposes of trade

or to such an extent as to affect prejudicially the owner of the copyright,

- (c) by way of trade exhibits in public,
- (d) imports for sale or hire into any part of His Majesty's Dominions to which the Copyright Act, 1911, extends,

any work which, to his knowledge, infringes copyright, or would infringe copyright if it had been made within the part of His Majesty's Dominions in or into which such act took place; *or*

- (iii) for his private profit, permits a place of entertainment to be used for the public performance of any copyright work, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Copyright Act, 1911, s. 2.

1690. The following acts are not infringements of copyright, viz.:— *Acts not infringements*

- (i) fair dealing with any work, for purposes of private study, research, criticism, review, or newspaper summary;
- (ii) the use, by the author of an artistic work, who is not the owner of the copyright, of any mould, cast, sketch, plan, model, or

study made by him for the purpose of the work, without thereby repeating or imitating the main design of the work;

- (iii) the making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, permanently situate in a public place or building, or (provided that they are not in the nature of architectural drawings or plans) of any architectural work of art;
- (iv) the publication in a collection (mainly composed of non-copyright matter), *bonâ fide* intended for the use of schools and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools; but not more than two passages may be published from one author by the same publisher in five years, and the source of all passages quoted must be acknowledged;
- (v) the publication, in a newspaper, of a report of a public lecture, report of which is not prohibited by express conspicuous written or printed notice;
- (vi) the reading or recitation in public by one

person of any reasonable extract from any published work;

Copyright Act, 1911, s. 2 (1).

- (vii) the publication of a newspaper report of an address of a political nature delivered at a public meeting;

Ibid. s. 20.

- (viii) in the case of a musical work, the making (after due notice and on payment of the statutory royalties) of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, where similar contrivances have been previously made by, or with the consent or acquiescence of, the owner of the copyright in the work.

Ibid. s. 19 (2).

[There are special and somewhat complicated provisions in the section on the subject of musical works or mechanical records published or made before the commencement of the recent Act (s. 19 (7) (8)).]

1691. Copyright is not deemed to be infringed by the reproduction of a copyright work twenty-five years (or, in the case of a work in which copyright existed on the 16th December, 1911, thirty years) after the death of the author; if the person reproducing the work proves that he has given the prescribed notice in writing of his intention so to do, *Reproduction of old works*

and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright, royalties in respect of all copies of the work sold by him, at the rate of ten *per cent.* on the published price.

Copyright Act, 1911, s. 3.

[The form of notice and the method of paying royalties may be prescribed by the Board of Trade (*ibid.*).]

*Compulsory
licenses*

1692. Where, at any time after the death of the author of a literary, dramatic, or musical work, which has been published or performed in public, it appears, on complaint to the Judicial Committee of the Privy Council, that the owner of the copyright has refused to allow republication or performance in public, and that, by reason of such refusal, the work is withheld from the public, the owner of the copyright may be ordered to grant a license to reproduce it or perform the work in public, on such terms, and subject to such conditions, as the Judicial Committee may think fit.

Ibid. s. 4.

[It will be observed that there is no power to compel the production of an unpublished work.]

*Scope of
copyright*

1693. Copyright arises in respect of works published in any part of His Majesty's Dominions to which the Act extends, whether by British subjects or not, and (in the case of an unpublished work) in

respect of works of British subjects, wherever resident, and, in the case of other persons, if resident in any part of such dominions to which the Act extends,^(a) and will be protected against all infringements within such dominions.^(b) But it will not be protected in respect of infringements in any of the self-governing dominions of the Crown,^(c) unless the provisions of the Copyright Act, 1911, are declared by the legislature of such dominion to be in force therein.^(d)

- (a) But protection may be refused to the works, published within the British Empire, of authors who are subjects of a foreign country which does not give, or undertake to give, adequate protection to the works of British authors (Copyright Act, 1911, s. 23).

[For the purposes of the provisions of the Act as to residence, an author is deemed to be resident in any part of the British Dominions to which the Act extends, if he is domiciled therein (s. 35 (5)).]

- (b) *Ibid.* s. 1 (1).

- (c) These are, the Dominions of Canada and New Zealand, the Commonwealth of Australia, the Union of South Africa, and the Colony of Newfoundland (s. 35).

- (d) *Ibid.* s. 25 (1). (The adoption of the Act by a dominion may be certified by a Secretary of State by notice in the *London Gazette* (*ibid.* (2))). Reciprocal protection may be given by Order in Council where the dominion, though not adopting the Act, affords adequate protection for the works of authors resident in the British Empire outside the dominion in question (s. 26 (3)).

[Arrangements may also be made by Order in Council for giving whole or partial effect to the provisions of the Copyright Act, 1911, in respect of works published in a foreign country, or made by residents in a foreign country; but only after the making of a convention by which reciprocal rights are secured in such country for the proprietors of British copyright (ss. 29, 30). The latter rights are, obviously, not created or enforced by English law; and the details of the former must be sought in the Orders in Council affecting such countries respectively. Such countries are said to be within the Copyright Union, and have accepted, with more or less reservation, the resolutions of the Berne Convention of 1886 and

the Berlin Convention of 1906. They include most of the civilized States of the world, but not the United States of America, nor the Chinese Republic. The benefits of the Act may also be extended, by Order in Council, to British Protectorates, and to Cyprus (s. 28). Under these provisions, Orders in Council, dated 24th June, 1912 (two) have applied the provisions of the Act of 1911 to the countries within the Union and to British Protectorates and Cyprus. The older Orders are still in force in the dominions to which the Act of 1911 does not apply.]

*Remedies for
infringement*

1694. The owner of a copyright or any interest therein, whose rights have been infringed, has the ordinary civil remedies by way of an action for damages, or account of profits, and an injunction against the infringer.

Copyright Act, 1911, s. 6 (1).

[Costs of all proceedings are in the absolute discretion of the Court. *Ibid.* (2).]

But: —

- (i) where the defendant proves in such action that he was not aware of, and had no reasonable ground to suspect, the existence of the copyright, the plaintiff will not be entitled to any remedy other than an injunction;

Ibid. s. 8.

- (ii) where the construction of a building or other structure which infringes, or would, if completed, infringe, copyright, has been commenced, no injunction restraining its

completion, or ordering its demolition, will be granted;

Ibid. s. 9.

[Obviously, if the infringer, in such a case, proves that he was an innocent offender, no remedy at all lies against him.]

(iii) an action in respect of infringement of copyright must be commenced within three years next after the infringement.

Ibid. s. 10.

1695. Subject to § 1694 (i) and (ii), all infringing copies of any work in which copyright exists, and all plates used or intended to be used in or for the production thereof, are deemed to be the property of the owner of the copyright, who may take proceedings for recovery of possession thereof, or in respect of the conversion thereof. *Forfeiture of pirated copies*

Ibid. s. 7.

[It seems very doubtful on the Act whether this provision applies to an innocent infringer (s. 8); and it does not apply to buildings or other structures which constitute infringements of copyright (s. 9 (2)). For some kinds of infringement of copyright, the infringer is liable to criminal prosecution, resulting in fine or, in case of repetition, imprisonment (ss. 11-13).]

1696. In addition to his other remedies, the owner of copyright may, on taking the proper steps, and complying with the Regulations on the subject, cause the importation into the United Kingdom *Prohibition of importation*

(which, for this purpose, does not include the Isle of Man) of infringing copies of his work, to be prohibited.

Copyright Act, 1911, s. 14.

*Abolition of
'common
law right'*

1697. No rights in the nature of copyright, other than those conferred or recognized by the Copyright Act, 1911, can be claimed in any literary, dramatic, musical, or artistic work.

Ibid. s. 31.

[Thus the old so-called 'common law right' in unpublished material is abolished; copyright now running from production, or 'making,' not from publication. But the remedies conferred by the recent Musical Copyright Acts of 1902 and 1906 are expressly reserved by the Act of 1911.]

SECTION XIV

ALIENATION OF CHOSSES IN ACTION

TITLE I—VOLUNTARY ALIENATION

1698. Subject to the exceptions and provisions contained in Section XIII, any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only^(a)) of any debt or other legal chose in action, of which express notice in writing^(b) shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, will be, and be deemed to have been, effectual in law (subject to § 1699) to pass or transfer the legal right to such debt or chose in action from the date of such notice,^(c) and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.^(d)

- (a) This clause does not exclude an assignment by way of mortgage in the ordinary form, i. e. absolute assignment with a proviso for redemption (*Durham Bros. v. Robertson* [1898] 1 Q. B. 765; *Bateman v. Hunt* [1904] 2 K. B. 530), nor an assignment upon trust (*Comfort v. Betts* [1891] 1 Q. B. 737). But it does exclude, even though the word 'assign' is used, a mere charge or security (*Mercantile Bank of London v. Evans* [1899] 2 Q. B. 613), and, *semble*, though the point is still formally open, an assignment even of a definite part of an ascertained debt (*Foster v. Baker* [1910] 2 K. B. 636).

- (b) The notice, though it must be express, need not be formal. Any document which indicates to the person liable the existence of the assignment, is sufficient (*Denney v. Conklin* [1913] 3 K. B. 177).
- (c) And, therefore, in the absence of fraud, or knowledge by a later assignee of an earlier assignment, successive assignments will rank, not in order of date, but in order of notice to the debtor (*English, Scottish, &c. Insurance Co. v. Brunton* [1892] 2 Q. B. 700).
- (d) Judicature Act, 1873, s. 25 (6).

[The scope of this well-known enactment is extremely difficult to ascertain; and two obvious questions encounter the interpreter, viz. (i) what rights are choses in action within the meaning of the sub-section?, and (ii) which of these are 'legal'? Regard being had to the wording of the s.-s. itself, it can hardly be assumed to include interests such as patents, trade marks, goodwill, or even stocks and shares, as to which there is no 'debtor, trustee, or other person' liable, to whom notice of assignment can be given (*Torkington v. Magee* [1902] 2 K. B., at p. 430, *per* Channell, J.). But there would seem to be no *prima facie* difficulty in including all other forms of incorporeal personal property. Again, what is a 'legal' chose in action? Properly speaking, in 1873, it should have meant only rights capable of being enforced in a Common Law Court, i. e. practically, only claims for debts or damages; and, as the Judicature Act dealt primarily with procedure, it might well be supposed that this was the meaning of the word 'legal' in this connection. But the use of the word 'trustee' in the s.-s. seems to indicate that ordinary claims by a beneficiary against his trustee are intended to fall within its scope; though these were clearly not enforceable at law in 1873. Apparently, by a sort of prolepsis, the framers of the Act regarded the intended fusion of jurisdictions as already accomplished, and used the word 'legal' in the sense of 'enforceable in a court of justice.' At any rate, the Judicial Committee has declined to express any dissent from the view laid down in a Colonial Court, to the effect that the phrase includes 'all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful' (*King v. Victoria Insurance Co.* [1896] A. C., at p. 256); and it is quite certain that many claims enforceable only in equity were by Courts of Equity treated as assignable. On the other hand, it is equally clear that the s.-s. did not intend to make rights assignable which were not, prior to the Act, regarded as voluntarily transferable either at law or in equity, e. g. claims to undiluted damages in tort (*ante*, Bk. II, Pt. III, Sect. I, Tit. VI,

§ 788). It seems, then, the safest conclusion to draw, that all that the s-s. has done is to allow an assignee, when its provisions have been complied with, to sue in his own name in any court, instead of requiring him to resort to a Court of Equity to compel the assignor to lend the use of his name. Thus, for example, the assignee of the benefit of a claim under an insurance policy, even though the assignment is only by way of mortgage, can now sue the insurance company in his own name (*Swan's and Cleland's Graving Dock v. Maritime Insurance Co.* [1907] 1 K. B. 116.).

1699. Such assignment will be subject to all claims, *Subject to equities* whether legal or only equitable, which, at the time when he received notice of the assignment, the debtor, trustee, or other person liable would have been entitled to raise by way of defence or set-off, against the assignor seeking to enforce the chose in action.

Judicature Act, 1873, s. 25 (6).

Newfoundland v. Newfoundland Ry. Co. (1888) L. R. 13 App. Ca. 199.

Stoddart v. Union Trust, Ltd. [1912] 1 K. B. 181.

[In the last case, the party liable sought in vain to set up, against the assignee, a plea of fraud which, the contract having been confirmed, could not be used as a defence to the action on the contract, but only as an independent claim in tort against the assignor.]

1700. If the debtor, trustee, or other person liable *Interpleader by party liable* in respect of such debt or chose in action has received notice that any such assignment is disputed by the assignor or any person claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he may call upon the rival claimants

to interplead, or pay the sum due from him into Court under the Trustee Act, 1893.

Judicature Act, 1873, s. 25 (6).

Trustee Act, 1893, s. 42.

*Assignment
of future
debts*

1701. Future debts arising out of an existing contract may be validly assigned at law under the provisions of § 1698 as against the debtor; ^(a) but an assignment of future debts which will not arise until conditions involving the carrying on of the assignor's business have been fulfilled, will not be valid against the trustee in bankruptcy of the assignor, if the conditions have not been fulfilled before the commencement of the bankruptcy. ^(b)

(a) *Brice v. Bannister* (1878) 3 Q. B. D. 569.

Walker v. Bradford Old Bank (1884) 12 Q. B. D. 511.

Jones v. Humphreys [1902] 1 K. B., at p. 13, *per* Alverstone, C. J.

Skipper v. Holloway, [1910] 2 K. B., at p. 634, *per* Darling, J.

(b) *Ex parte Nichols* (1883) 22 Ch. D. 782.

In re Davis (1888) 22 Q. B. D., at p. 199.

Wilmot v. Alton [1897] 1 Q. B. 17.

[There is not much authority for saying that debts to arise in the future out of an existing contract, as distinguished from debts due but not yet payable, can be legally assigned; even apart from the question of bankruptcy. But *Walker v. Bradford Old Bank* seems to justify the view.]

*Equitable
assignment*

1702. A valid equitable assignment of any chose in action can be made by word of mouth or writing not in accordance with the provisions of § 1698; ^(a) except that no assignment of any trust can be made

otherwise than by writing signed by the assignor, or by his testament.^(b) But no merely equitable assignment of a legal chose in action will entitle the assignee to sue the person liable without joining the assignor;^(c) and an equitable assignment of a future chose in action, not arising out of an existing contract, even though made by deed, requires a valuable consideration.^(d)

- (a) *Ex parte South* (1818) 3 Swanst. 392.
Diplock v. Hammond (1854) 5 De G. M. & G. 320.
Brandts v. Dunlop [1905] A. C. 454.

[Of course, no assignment will bind the party liable until he has notice of it; and the assignee takes subject to all equities between the assignor and the party liable (*Torkington v. Magee* [1903] 1 K. B. 644).]

- (b) Statute of Frauds (1677) s. 9.
Wills Act, 1837, s. 3.
(c) *Torkington v. Magee* [1902] 2 K. B., at p. 432, *per* Channell, J.
Glegg v. Bromley [1912] 3 K. B., at p. 489, *per* Parker, J.

[The objection of want of parties cannot be insisted on if it is clear that the assignor has no interest in the proceedings (*Brandts v. Dunlop*, *ubi sup.*, at p. 462).]

- (d) *Meek v. Kettlewell* (1843) 1 Ph. 342.
Tailby v. Official Receiver (1888) L. R. 13 App. Ca. 523.
Re Ellenborough [1903] 1 Ch. 697.
Glegg v. Bromley [1912] 3 K. B. 474.

[No consideration is required for the validity of an assignment of existing choses in action (*Kekewich v. Manning* (1851) 1 De G. M. & G. 176; *Re Patrick* [1891] 1 Ch. 82, C. A.; *Re Fitzgerald* [1904] 1 Ch. at p. 591, *per* Cozens, Hardy, L. J.); and, even in the case of assignments of future debts, if they arise out of an existing contract, the debtor will (*semble*) not be allowed to raise any objection, founded on want of valuable consideration, to the validity of the assignment (*Walker v. Bradford Old Bank* (1884) 12 Q. B. D. 511). *Tailby v. Official Receiver* is important also as overruling the doctrine laid down in *Belding v. Read* (1865) 3 H. & C. 955,

and *Re D'Epineuil* (1882) 20 Ch. D. 758, to the effect that an assignment, for valuable consideration, of future choses in action not limited to any particular source, is not enforceable, even in Equity.]

*Notice in
case of future
choses in ac-
tion*

1703. In the case of an assignment of future choses in action, consisting of claims upon a fund, the claims of rival assignees rank in the order in which notices of their assignments have been received by the trustee or holder of the fund after he has obtained effective control of the fund out of which payment is to be made.

Johnstone v. Cox (1881) 19 Ch. D. 17.
Re Dallas [1904] 2 Ch. 385.

*Bills of Sale
Acts not ap-
plicable*

1704. Choses in action (including debentures^(a) and future interests in chattels corporeal^(b)) are not within the provisions of the Bills of Sale Acts, 1878 and 1882,^(c) or the Sale of Goods Act, 1893.^(d)

(a) Bills of Sale Act, 1882, s. 17.

(b) *Re Tritton* (1889) 61 L. T. 301.
Re Thynne [1911] 1 Ch. 282.

(c) Bills of Sale Act, 1878, s. 4.

(d) Sale of Goods Act, 1893, s. 62 (1).

TITLE II—INVOLUNTARY ALIENATION

1705. Upon an adjudication in bankruptcy there *Bankruptcy* passes to the trustee in bankruptcy^(a) the ownership of all the choses in action belonging beneficially to the bankrupt at the commencement of the bankruptcy,^(b) including debts due and growing due to the bankrupt in the course of his trade or business, as to which any assignee thereof has not taken steps to remove them from the order and disposition of the bankrupt.^(c) Choses in action acquired by the bankrupt, after his adjudication but before his discharge, will also pass to his trustee in bankruptcy; subject to the provisions of Bk. I, § 70, *ante*.^(d)

(a) Bankruptcy Act, 1914, s. 18.

[The property passes from trustee to trustee on appointment, without formal transfer (s. 53).]

(b) For the meaning of this expression, see *ante*, Sect. V, § 1453 (d).

(c) Bankruptcy Act, 1914, s. 38 (e).

Rutter v. Everett [1895] 2 Ch. 872.

(d) Bankruptcy Act, 1914, s. 38 (a).

1706. The trustee in bankruptcy may, subject to *Disclaimer by trustee* the conditions specified in Sect. V, §§ 1454–1456, *ante*, disclaim any shares or stock in companies, or unprofitable contracts, or any other choses in action of the bankrupt, which are unsaleable by reason of their

binding the 'possessor' thereof to the performance of any onerous act or to the payment of any sum of money.^(a) And the Court may, on the application of any one who is, as against the trustee, entitled to the benefit, or subject to the burden, of a contract made with the bankrupt, rescind such contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable.^(b)

(a) Bankruptcy Act, 1914, s. 54 (1).

(b) *Ibid.* s. 54 (5).

*Garnishment
of debts*

1707. A judgment creditor may (subject to § 1637, *ante*), obtain an order for attachment and payment to himself of any debt owing or accruing due to his judgment debtor, by means of garnishee proceedings against the person owing such debt ('garnishee').^(a) Service of a garnishee order or notice thereof will bind the debt in the hands of the garnishee,^(b) but will not be binding on the trustee in bankruptcy of the judgment debtor, unless the attachment is completed by receipt of the debt by the judgment creditor before the commencement of the bankruptcy.^(c)

(a) O. XLV. r. 1. (O. XXVI. r. 1 of C. C. Rules.)

[The judgment must be still 'unsatisfied,' i. e. the judgment debtor must be actually in arrears under it (*White v. Stenning* [1911] 2 K. B. 418).]

(b) O. XLV. r. 2.

(c) Bankruptcy Act, 1914, s. 40 (1) (2).

[The effect of payment into Court 'to abide further order' is not to 'complete' the attachment (*Butler v. Wearing* (1885) 17 Q. B. D. 182).]

1708. For the purposes of § 1707, 'debt' includes *Debts capable of being garnished* (i) a sum of money in the hands of a receiver in an administration action, payable to the judgment debtor,^(a) (ii) the proceeds of an execution levied by the sheriff at the suit of the judgment debtor,^(b) (iii) an annuity or other sum of money in the hands of trustees, payable to the judgment debtor,^(c) (iv) money arising from the property of a married woman restrained from anticipation (*ante*, Bk. I, §§ 105–108), provided that it was payable to her before the date of the garnishor's judgment,^(d) and (v) funds received by an Insurance Committee for distribution among the doctors on its panel.^(e)

- (a) *Re Cowan's Estate* (1880) 14 Ch. D. 63, as modified by *Webb v. Stenton* (1883) 11 Q. B. D. 518.
- (b) *Re Greer* [1895] 2 Ch. 217.
- (c) *Webb v. Stenton*, *ubi sup.*
- (d) *Hood Barrs v. Heriot* [1896] A. C. 174.
- (e) *O'Driscoll v. Manchester Insurance Committee* [1915] 1 K. B. 811.

1709. Bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, and other securities *Execution against securities* for money belonging to a judgment debtor, may be seized under a writ of Fieri Facias or County Court execution, and enforced for the benefit of the judgment creditor.

Judgments Act, 1838, s. 12.
County Courts Act, 1888, s. 147.

M M

[In the High Court action, the sheriff sues on the securities, and hands the proceeds to the creditor (Judgments Act, 1838, s. 12). In the County Court action, the creditor sues in the name of the debtor (County Courts Act, 1888, s. 148).]

*Charging
order*

1710. A charging order in favour of any creditor who has obtained judgment in the High Court may be made against any interest, legal or equitable, of the judgment debtor in any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not),^(a) including stocks, funds, annuities, or shares in Court.^(b) Such order will have the same effect as if a charge in the creditor's favour had been given on such stocks, funds, annuities, or shares, by the judgment debtor; but it cannot be enforced until six months from the date of the order.^(c)

(a) Judgments Act, 1838, ss. 14, 15.

(b) Judgments Act, 1840.

(c) Judgments Act, 1838, s. 14.

[Meanwhile, the charging order may be protected by a 'stop order' (in the case of a fund in Court), or by notice to the company or other body concerned (O. XLVI, rr. 4-13), which takes the place of the old writ of Distringas (*ibid.* r. 2; *ante*, § 1618, n.). A separate judgment creditor of a partner can obtain a charging order against his debtor's interest in the partnership, under s. 23 of the Partnership Act, 1890.]

*Appointment
of receiver*

1711. In any case in which choses in action which belong to a judgment debtor, and are available for payment of his debts,^(a) cannot be reached by any of

the other methods specified in this Title,^(b) the Court may, in the exercise of its discretion, appoint a receiver of the debtor's interest, present or future,^(c) with a view to its realization for the benefit of the creditor.^(d)

- (a) *Holmes v. Millage* [1893] 1 Q. B. 551 (future salary).
Cadogan v. Lyric Theatre [1894] 3 Ch. 338 (future profits of theatre).
- Edwards v. Picard* [1909] 2 K. B. 903 (future earnings of patent).

[In these cases the Court held that there was no available chose in action. The object of the procedure is merely to overcome technical difficulties, not to enlarge the scope of liability; though in fact it does the latter, in the cases to which it applies. But, (*semble*), since *Tailby v. Official Receiver* (1888) L. R. 13 App. Ca. 523, there can be no doubt that a voluntary alienation of the future rights discussed in the above cases would be valid.]

- (b) *Goldschmidt v. Oberrheinische Metallwerke* [1906] 1 K. B. 373.
- (c) *Tyrrell v. Painton* [1895] 1 Q. B. 202.
Holland v. Ideal Bedding Co. [1907] 2 Ch. 157.
- (d) *Re Shephard* (1889) 43 Ch. D. at p. 135, *per* Cotton, L. J.

[The appointment of a receiver does not create any charge on the chose in action (*Ridout v. Fowler* [1904] 2 Ch. 93), or give the creditor a right to an order for sale (*Flegg v. Prentis* [1892] 2 Ch. 428), or any priority over earlier equitable claimants to the fund (*Arden v. Arden* (1885) 29 Ch. D. 709). But it does give the creditor priority over subsequent equitable claims (*Re Marquis of Anglesey* [1903] 2 Ch. 727).]

SECTION XV

INEFFECTUAL ALIENATIONS OF PROPERTY

TITLE I—UNDER THE ACT OF 1571 (13 ELIZ. c. 5)

*Fraudulent
conveyance*

1712. Any disposition *inter vivos* ^(a) of property, real or personal, corporeal or incorporeal, ^(b) made to the intent to delay, hinder, or defraud creditors ^(c) and others of their just and lawful claims, will be void as against such creditors and others; ^(d) except that it cannot be set aside at the expense of any person who has, *bonâ fide* and for valuable consideration, ^(e) acquired an interest in such property under such disposition, ^(f) without any manner of notice of the intended fraud. ^(g)

- (a) The Act (s. 1) expressly enumerates 'feoffment, gift, grant, alienation, bargain, conveyance, . . . by writing or otherwise, and all and every bond, suit, judgment, and execution.' It is believed, however, that there is no instance of a disclaimer having been held fraudulent under the statute; though a disclaimer might very well be made with direct intent to defeat creditors. (Of course a testamentary disposition cannot be a fraudulent disposition in the sense of the statute; because it can only operate after the testator's creditors have been satisfied.)
- (b) There was at one time a doctrine that a chose in action, which, at the common law, could not be taken in execution, was not within the statute. But the doctrine is now clearly obsolete (*Stokoe v. Cowan*, (1861) 29 Beav. 637; *Edmunds v. Edmunds* [1904] P. 362). For a similar reason, copyholds were at one time outside the scope of the statute (*Mathews v. Feather* (1786) 1 Cox, 278). But the reason clearly disappeared with the passing of the Judgments Act, 1838, which (s. 11) expressly made copyholds liable to execution.

- (c) There need not be more than one creditor defrauded (*Edmunds v. Edmunds* [1904] P. 362).
- (d) It is generally assumed that the expression 'creditors and others' (which does not appear in the enacting clause, but is borrowed by reference from the preamble of the statute), though wide enough to include subsequent as well as existing creditors of all kinds, does not include purchasers. This construction is probably due to the wording of the preamble and enacting clause, which seems inapplicable to purchasers. Purchasers of lands can, of course, rely on the 27 Eliz. (1584) c. 4, as modified by the Voluntary Conveyances Act, 1893 (*ante*, Sect. IV, Tit. I, § 1397). And purchasers of chattels corporeal are greatly protected by the Bills of Sale Acts (*ante*, Sect. X, Tit. I, §§ 1559-60; Tit. II, §§ 1573-79), and the doctrine of 'market overt' (*ante*, Sect. X, Tit. I, § 1568). But there seems to be no statutory protection for *bonâ fide* purchasers of choses in action who find themselves defrauded by a previous assignment.
- (e) The Act says 'good' consideration; but, from very early days, judicial interpretation has glossed it as 'valuable' (*Twyne's Case* (1601) 3 Rep., at 81 b). Moreover, an existing debt is not of itself valuable consideration for the purpose; though forbearance to sue for such debt may well be (*Glegg v. Bromley* [1912] 3 K. B. 474).
- (f) 13 Eliz. (1571) c. 5, s. 5. The purchaser need not take directly by the fraudulent conveyance; and the interest that he acquires need not be clothed with the legal estate or ownership (*Halifax Joint Stock Banking Co. v. Gledhill* [1891] 1 Ch. 31).
- (g) 13 Eliz. (1571) c. 5, ss. 1, 5.

[It seems extraordinary that there should be no official short title for this important statute.]

1713. Any of the following circumstances occurring in connection with a disposition of property *inter vivos* will, unless satisfactorily explained, raise a presumption that such disposition was made with intent to delay, hinder, or defraud creditors, viz.: —

- (i) that the disposition was of all, or substantially all, the disposer's property;
- (ii) that the disposer continued in possession

'Badges of fraud'

or control of the property after the disposition;

[This presumption may, of course, be rebutted by showing that the disposition was intended as a *bonâ fide* mortgage or other security (*Stone v. Grubham* (1614) 2 Bulstr., at p. 226, *per* Coke, C. J.; *Edwards v. Harben* (1788) 2 T. R., at p. 595, *per* Buller, J.).]

- (iii) that the disposition was made secretly ;
- (iv) that the disposition was made while the person seeking to impeach the disposition (? any creditor) was attempting to enforce his claim by legal proceedings ;
- (v) that there was a trust between the parties for the benefit of the disposer ;
- (vi) that the disposition, if in writing, contains unusual clauses.

Twyne's Case (1601) 3 Rep. 81 a.

*Voluntary
settlements*

1714. A voluntary disposition of property *inter vivos* will be deemed fraudulent for the purposes of § 1712, if when it was made the disposer was either:—

- (i) insolvent without the aid of the property comprised in the disposition ; *or*

Freeman v. Pope (1870) L. R. 5 Ch. App., at p. 545, *per* Giffard, L. J.
Re Lane Fox [1900] 2 Q. B., at p. 513, *per* Wright, J.

- (ii) about to enter upon a hazardous business in which he was likely to incur debts which he could not pay without recourse to the property included in the disposition.

Stileman v. Asbdown (1742) 2 Atk., at p. 481, *per* Lord Hardwicke, C.
Mackay v. Douglas (1872) L. R. 14 Eq. 106.

In both these cases, the facts raise a presumption of an intent to defeat creditors.^(a) In other cases, it is necessary for the person seeking to set aside the disposition, either to prove actual intention to defraud, or to raise a presumption of such intention by other means (*ante*, § 1713).^(b)

- (a) *Freeman v. Pope* (1870) L. R. 5 Ch. App. 538.
Cornish v. Clark (1872) L. R. 14 Eq. 184.
Mackay v. Douglas, *ubi sup.*
Gregg v. Holland [1902] 2 Ch., at pp. 373, 381.
 (b) *Spirett v. Willows* (1864) 3 De G. J. & S. 293, as modified by
Freeman v. Pope, *ubi sup.*

1715. Subject to § 1714, the mere fact that a *Subsequent* voluntary disposition does in fact defeat *creditors* subsequent creditors, does not entitle such subsequent creditors to set it aside.

Ex parte Mercer (1886) 17 Q. B. D. 290.
Re Lane Fox [1900] 2 Q. B. 508.

[It was laid down, *obiter*, by Lord Westbury, in *Spirett v. Willows*, *ubi sup.*, at p. 302, that a different rule applied to creditors whose claims existed at the time of the disposition. But that view has been questioned by Lord Hatherley, in *Freeman v. Pope*, *ubi sup.*, at p. 543, and was not acted upon by Lord Romilly, M. R., in *Kent v. Riley* (1872) L. R. 14 Eq. 190. On principle, there seems to be no reason why a voluntary settlement which leaves the settlor solvent should be, *ipso facto*, void; even against existing creditors.]

1716. For the purposes of §§ 1714 and 1715, a *Illusory* voluntary disposition includes a disposition made for *consideration*

a consideration so inadequate as to be illusory or merely colourable.

Mathews v. Feaver (1786) 1 Cox, 278.

Dewey v. Bayntun (1805) 6 East, 257.

Strong v. Strong (1854) 18 Beav. 408.

Re Maddoer (1883) 27 Ch. D. 523.

[It has been held that, for the purposes of the 27 Eliz. (1584) c. 4, a voluntary conveyance may become a conveyance for value by the giving of subsequent consideration (*Prodgers v. Langham* (1663) 1 Sid. 133). But it is believed that this doctrine has never been applied to the statute of 1571.]

*Remedy of
creditors*

1717. Any creditor as against whom any disposition is void under § 1712,^(a) or the trustee in bankruptcy of the disposer,^(b) is entitled to bring an action against the holders of the property comprised in it, to compel such holders to make the property available for the payment of the disposer's debts. And the property, when recovered, will not only be available for payment of all creditors who would have been entitled to bring actions to set aside the disposition, but will be available for payment of all the disposer's debts *pro rata*.^(c)

(a) *Reese River Mining Co. v. Atwell* (1869) L. R. 7 Eq. 347. (It is not necessary that the creditor suing should have obtained a judgment or charge on the property (*ibid.*).)

Ideal Bedding Co. v. Holland [1907] 2 Ch. 157.

[The holder of a judgment or execution need not, however, sue on behalf of creditors generally (*Blenkinsopp v. Blenkinsopp* (1850) 12 Beav. 568; *Smith v. Hurst* (1852) 10 Hare, 30). Apparently, these cases are not overruled by *Reese River Co.*, *ubi sup.*]

(b) *Grimsby v. Ball* (1843) 11 M. & W. 531. The bankruptcy jurisdiction is the proper tribunal for the purpose (*Ex parte Butters* (1880) 14 Ch. D. 265).

- (c) *Taylor v. Jones* (1743) 2 Atk. 600.
Richardson v. Smallwood (1822) Jac. 552.
Strong v. Strong (1854) 18 Beav. 408.
Jenkyn v. Vaughan (1856) 3 Drew. 419.

1718. If there is in existence any creditor against whom a disposition is void under § 1712, and such creditor refuses to take steps to set aside the disposition, any other creditor of the disposer may do so; notwithstanding the fact that the disposition is not void against such other creditor. *Subrogation of creditors' rights*

- Jenkyn v. Vaughan, ubi sup.*
Freeman v. Pope (1869) L. R. 9 Eq. 206.
Crossley v. Elsworth (1871) L. R. 12 Eq. 158.

1719. Subject to the right of creditors to set it aside as against themselves under § 1712, the disposition in question will, unless otherwise invalid, be effectual between the parties to it, and other persons not being creditors of the disposer. *Dispositions valid between parties*

- Blenkinsopp v. Blenkinsopp* (1849) 12 Beav. 568.
Tarleton v. Liddell (1851) 17 Q. B. 390.
Ideal Bedding Co. v. Holland [1907] 2 Ch. 157.

[And, therefore, if there is any possibility of a surplus after paying all creditors, the Court will not direct the disposition to be cancelled, but merely order the holders of the property to concur in all acts necessary for making the property available for payment of the creditors (*Ideal Bedding Co. v. Holland, ubi sup.*).]

1720. Whether a purchaser who claims under a fraudulent disposition as a *bonâ fide* purchaser for value *Purchaser without notice*

uable consideration is affected with notice of the fraud, is a question of fact in each case.

Copis v. Middleton (1818) 2 Madd. 410.

[In this important case, Plumer, V. C., laid it down that neither (i) the disposer's insolvency, nor (ii) the fact that the disposer and the purchaser were near relations, nor (iii) evidence of inadequacy of price, nor (iv) failure of the purchaser to investigate the title, were of themselves sufficient to affect the purchaser with notice of the fraud. It has elsewhere been laid down that neither (i) knowledge by the purchaser that the disposer was in failing circumstances (*Re Gillo* (1891) 8 Morr. 157), nor (ii) knowledge that the effect of the purchase might be to defeat a particular creditor (*Holbird v. Anderson* (1793) 5 T. R. 235) or even creditors generally (*Re Cranstoun* (1892) 9 Morr., at p. 167; *Glegg v. Bromley* [1912] 3 K. B. 474), will necessarily affect the purchaser with notice of the fraud.]

*Lapse of
time*

1721. (*Semble*) a creditor who has been defrauded, or is deemed to have been defrauded, by a disposition of property, is not barred by any lapse of time, from taking proceedings to avoid the disposition; so long as his debt is personally recoverable against the disposer. And the mere fact of delay, even unexplained, in enforcing his rights, will not deprive him of his remedy under the statute.

Re Maddever (1883) 27 Ch. D. 523.

[About the second part of the above § there can be no doubt; for the creditor's right is legal, not equitable. But, on principle, the period of limitation should run from the making of the disposition, not from the incurring of the debt. However, it would be difficult to bring such an action within the terms of the Limitation Act of 1623. In *Re Maddever*, *supra*, the creditor slept on his rights for ten years; but his claim, being by specialty, was not barred.]

NOTE

Section 2 of the Act of 1571 imposes substantial penalties, recoverable by penal actions, on persons making dispositions fraudulent under the Act. Such penalties are rarely enforced; but the existence of the section entitles the disposer to refuse, in the civil action to set aside the disposition, to answer questions; on the ground that to answer might incriminate him (*Michael v. Gay* (1858) 1 F. & F. 409). It should also be noted, that the effect of fraud, misrepresentation, mistake, etc., as between the parties to a disposition of property, has been already dealt with in Bk. I, Sect. III, Tit. II, §§ 81-90, *ante*.

TITLE II — UNDER THE BANKRUPTCY ACT AND THE COMPANIES ACT

*Act of bank-
ruptcy*

1722. A disposition which is fraudulent under Title I, or otherwise, is an act of bankruptcy,^(a) and, if followed within three months by the presentation of a bankruptcy petition upon which an order of adjudication is made, will be void against the trustee in bankruptcy;^(b) unless it was made for value before the date of the receiving order, in favour of a person who had not, at the time when it was made, notice of any available act of bankruptcy committed by the bankrupt.^(c)

- (a) Bankruptcy Act, 1914, s. 1 (b).
Re Slobodinsky [1903] 2 K. B. 517.
- (b) Bankruptcy Act, 1914, ss. 37, 38.
- (c) *Ibid.*, s. 45.

[In *Re Badham* (1893) 10 Morr. 252, Vaughan Williams, J., refused to allow a *bonâ fide* creditor to take advantage of this exception, where the disposition had been made after the presentation of the bankruptcy petition. But this decision was distinguished, on grounds which are not very clear, by Bigham, J., in *Re Dunkley* [1905] 2 K. B. 683. If the first purchaser cannot claim the benefit of s. 45, subsequent purchasers, even though *bonâ fide*, cannot (*Re Gunsbourg* [1920] 2 K. B. 426).]

*Fraudulent
preference*

1723. Every disposition of property made, and every obligation incurred, by a person unable to pay his debts as they become due, from his own money, in favour of or in trust for any creditor, with a view of giving such creditor preference over his other

creditors, will be void (except as against a *bonâ fide* purchaser for valuable consideration through or under a creditor of the bankrupt), if such person becomes bankrupt on a petition presented within three months of such disposition or creation.^(a) But a payment or transfer of property to a *bonâ fide* creditor, as the result of pressure genuinely applied by such creditor, or apprehended by the debtor, will not be a preference for this purpose; even though, in fact, it gives such creditor an advantage over the other creditors.^(b)

(a) Bankruptcy Act, 1914, s. 44.

(b) *Ex parte Taylor* (1886) 18 Q. B. D. 295.
New, Prance & Co.'s Trustee v. Hunting [1897] 1 Q. B. 607.

[It is immaterial that the creditor is aware of the debtor's circumstances (*Ex parte Taylor, ubi sup.*), or that the liability of the debtor was not legally enforceable (*Re Tweedale*) [1892] 2 Q. B. 216).]

1724. Any voluntary settlement (as defined in § 1725) will (subject to § 1727) be void, as against his trustee in bankruptcy,^(a) if the settlor becomes bankrupt within two years of the date of the settlement; and it will be void as against such trustee if the settlor becomes bankrupt within ten years of such date,^(b) unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement,^(c) and that the beneficial interest of the settlor

*Avoidance
of voluntary
settlements*

in such property^(d) (had) passed to the trustee of such settlement^(e) on the execution thereof.^(f)

- (a) When the creditors have been satisfied, the surplus goes to the persons claiming under the settlement (*Re Sims* (1896) 3 Man. 340).
- (b) The dates are reckoned to the 'commencement of the bankruptcy,' i. e. to the first of the acts of bankruptcy committed within three months prior to the presentation of the petition (*Re Reis* [1904] 1 K. B. 451).
- (c) If property, though passing under the settlement, passes to the settlor himself, it will not be deemed to be 'comprised in the settlement' for this purpose (*Re Lowndes* (1887) 18 Q. B. D. 677).
- (d) The fact that the bare legal interest remains in the settlor, is immaterial (*Sbrager v. March* [1908] A. C. 402 (P. C.)), e. g. he can satisfy the requirements of the Act by declaring himself a trustee of property.
- (e) Or to the beneficiaries direct (*Re Lowndes, ubi sup.*).
- (f) Bankruptcy Act, 1914, s. 42 (1).

[Of course, cases which fall within this provision are frequently also within the terms of the Act of 1571 (*ante*, Tit. I); and the settlor's trustee in bankruptcy has then the option of proceeding under either statute. But it may be useful to point out that s. 42 of the Bankruptcy Act is wider than the old statute of Elizabeth in that (i) it requires no proof of fraud, express or implied, (ii) it throws the onus of proof (even after two years) on the person upholding the settlement, (iii) it draws no distinction between 'existing' and 'subsequent' creditors. On the other hand, it is narrower than the statute of Elizabeth (i) by reason of its time limits, (ii) because proof of solvency after the execution of the settlement is a complete answer after the lapse of two years, (iii) because it only applies to dispositions of property intended to be retained by the donees.]

*Definition of
'voluntary
settlement'*

1725. A settlement, for the purposes of § 1724 of this Title, means any conveyance or transfer of property^(a) which is intended to be retained and preserved as the property of the transferee,^(b) not being a conveyance or transfer made before and in consideration of marriage, or made in favour of a purchaser

or incumbrancer in good faith and for valuable consideration,^(c) or a conveyance or transfer made to or for the wife or children of the settlor, of property which has accrued to the settlor after marriage in right of his wife.^(d)

(a) Bankruptcy Act, 1914, s. 42 (4).

[This provision, apparently, applies also to the executory settlements described in the following §.]

(b) *Re Tankard* [1899] 2 Q. B. 57.

Re Plummer [1900] 2 Q. B. 790.

[I. e. a gift intended to be spent or consumed at once by the donee, or at his free disposal, is not a 'settlement' for this purpose.]

(c) Where the purchaser gives a consideration which manifestly applies only to part of the property transferred, the transfer will be valid as to that part, and invalid as to the rest (*Sturmey's Trustee v. Sturmey* (1912) 107 L. T. 718).

(d) Bankruptcy Act, 1914, s. 42 (1).

1726. Any covenant or contract made by any person, in consideration of his or her marriage, for the future payment of money for the benefit of, or for the future settlement of property wherein, at the date of the marriage, the settlor had no interest, on, the settlor's wife, husband, or children, will, if such money or property is not in right of the settlor's wife or husband, be void, in the event of the settlor being adjudged bankrupt, against his trustee in bankruptcy, in so far as such covenant or contract has not been executed at the date of the commencement of the settlor's bankruptcy.

Executory settlements

Bankruptcy Act, 1914, s. 42 (2).

[The persons entitled under the covenant or contract will be able to rank for dividend in the bankruptcy; but only after claims of other creditors for valuable consideration have been satisfied. And any payment of money (other than premiums on a life policy), or transfer of property, made by the settlor in pursuance of the covenant or contract, will be void; unless the persons receiving it can prove either (i) that it was made two years before the commencement of the bankruptcy, or (ii) that such payment or transfer left the settlor solvent, or (iii) that it was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a named person, and was in fact paid or made within three months after the money or property came under the control of the settlor (*ibid.*).]

*Purchaser
from volun-
teer*

1727. Notwithstanding the express words of § 1724, a purchaser in good faith and for valuable consideration from the donee under a voluntary settlement (as defined in § 1725) will be protected against the settlor's trustee in bankruptcy, if he acquires the property before the making of the receiving order against the settlor.

Carter's and Kenderdine's Contract [1897] 1 Ch. 776.
Re Hart [1912] 3 K. B. 6.

[In other words, 'void' in s. 42 (1) means 'voidable' (*Re Brall*. [1893] 2 Q. B. 381).]

*Mortgages
by companies*

1728. Every mortgage created by a company governed by the provisions of the Companies Clauses Act, 1845, must be entered in a register of mortgages and bonds kept by the company; ^(a) and every mortgage or charge created after 1st July, 1908, by a company registered under the Companies (Consoli-

dation) Act, 1908, and being of the kind specified in section 93 of such Act, will be void, so far as any security on the company's property or undertaking is thereby conferred, against the liquidator or any creditor of the company, unless it is registered with the Registrar of Joint Stock Companies within twenty-one days of its execution.^(b)

(a) Companies Clauses Act, 1845, s. 45.

[No penalty seems to be prescribed for breach of this enactment.]

(b) Companies (Consolidation) Act, 1908, s. 93.

Saunderson & Co v. Clark (1913) XXIX T. L. R. 579.

[The personal liability for the loan is not destroyed. The mortgages to which the section applies are mortgages or charges (a) to secure debentures, (b) of or on uncalled capital of the company, (c) created or evidenced by instruments which, if executed by individuals, would require registration as bills of sale, (d) of or on any interest in land, (e) of or on any book debts of the company, and (f) any floating charge on the undertaking or property of the company. There are many detailed regulations in the section.]

1729. Every transfer of shares made after the commencement of the winding up of a company registered under the Companies (Consolidation) Act, 1908 (other than a transfer made, in a voluntary winding up, to, or with the sanction of, the liquidator) is void. *Transfer of shares during winding up*

Companies (Consolidation) Act, 1908, s. 205.

[A winding up by the Court is deemed to commence with the presentation of the petition to wind up (*ibid.*, s. 139). A voluntary winding up commences with the passing of the resolution to wind up (*ibid.*, s. 183).]

*Fraudulent
preference
by companies*

1730. Any disposition of, or act relating to, property which, if made or done by or against an individual, would be deemed in his bankruptcy a fraudulent preference (*ante*, § 1723) will, if made or done by or against a company registered under the Companies (Consolidation) Act, 1908, be invalid.

Companies (Consolidation) Act, 1908, s. 210 (1).

[For the purposes of this §, the 'commencement' of the winding up (*ante*, § 1729 n.) is deemed to correspond with the act of bankruptcy of an individual (*ibid.*, s. 210 (2)).]

*Floating
charges*

1731. Any floating charge (*ante*, Sect. XIII, Tit. IV, § 1647) on the undertaking or property of such a company created within three months of (? prior to) the commencement of the winding up, will, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except as to the amount of cash actually paid to the company in consideration for the charge, and interest at five *per cent. per annum*.

Ibid., s. 212.

NOTE

It has already been pointed out (*ante*, Sect. I. Tit. IV, § 1079) that a settlement by a person on himself of his own property (even though only of a life interest), with a provision that it shall go over on his bankruptcy, is void against the trustee in bankruptcy. Probably the rule applies to a married woman, in the cases in which she can be made a bankrupt (Married Women's Property Act, 1882, s. 1 (5); Bankruptcy Act, 1914, s. 125).

TITLE III—UNDER THE RULE AGAINST PERPETUITIES

1732. Subject to §§ 1734–1738, *post*, any limitation by virtue of which any interest in any property may possibly arise or be transferred more than twenty-one years after the expiry of a life or lives in being ^(a) at the making of such limitation, ^(b) is wholly void; ^(c) and all limitations in the same conveyance subsequent to such limitation are also void. ^(d) For the purposes of this rule, a person *en ventre sa mère* is deemed to be born; whether he takes an interest under such limitation, or not. ^(e)

*Rule against
Perpetuities*

- (a) The persons whose lives are chosen for this purpose need not take any interest under the limitation. But they must be ascertainable (*Re Moore* [1901] 1 Ch. 936).
- (b) The rule (*ante*, Sect. VI, Tit. I, § 1470), that the exercise of a special power of appointment will be deemed to date from the settlement creating it, applies for the purposes of this calculation. (*Re Thompson* [1906] 2 Ch. 199; *Re Norton* [1911] 2 Ch. 27).
- (c) *Cadell v. Palmer* (1833) 1 Cl. & F. 372.
Re Lord Stratheden [1894] 3 Ch. 265.
- (d) *Beard v. Westcott* (1822) 5 B. & Ald. 801.
Monypenny v. Dering (1852) 2 De G. M. & G. 145.

[Mr. Gray, in his well-known work *The Rule Against Perpetuities* (§ 254), contends strongly that this application of the rule ought to be restricted to cases in which the subsequent limitations themselves transgress the main rule, or, at least, where they were manifestly intended to take effect after, not in lieu of, the limitations *primâ facie* invalid. But the wider application seems firmly fixed in English law. A limitation to take effect in *default* of exercise of a power which is void for remoteness is not, however, necessarily bad, if the power is not, in fact, exercised (*Re Abbot* [1893] 1 Ch. 54).]

- (e) *Long v. Blackall* (1797) 7 T. R. 100.
Re Wilmer's Trusts [1903] 2 Ch. 411.
Villar v. Gilbey [1907] A. C., at pp. 144, 149.

[It will be noted that the suspension for gestation may occur, not only at the beginning or end of the period, but during its currency, e. g. to X for life, and afterwards to such of his children as shall attain 21. Here a posthumous child of X can take on attaining 21.]

[The Rule against Perpetuities, now so strictly applied by the Courts, was (substantially) invented by the judges to restrain the executory interests which grew up after the Statute of Uses (*ante*, Sect. I, Tit. VIII, § 1183). The older forms of future interests in land, viz. legal remainders, were considered, until lately, to be sufficiently restrained by the rule that a contingent remainder 'failed,' unless it was ready to take effect on the expiry of the 'particular' estate immediately preceding it. But executory limitations were (except in rare cases) indestructible by similar events; and, after considerable hesitation, the Courts adopted, with regard to them, the rule in the text, which is usually considered to have received its final shape in the case of *Cadell v. Palmer*, *ubi sup.* The rule is said (e. g. by Lord Kenyon in *Long v. Blackall*, *ubi sup.*) to have been modelled on the practice of strict settlements, by which estates tail were limited, after the life estate of the husband, to the unborn children of the marriage, and under which the youngest child must obviously have attained 21 within a few months after 21 years from his father's death, and so have been able to bar the entail. But it is obvious that the Rule against Perpetuities, in its final form, is a good deal less strict than the practice of strict settlements; inasmuch as it allows the 'life or lives in being' to be arbitrarily chosen. It is said by Mr. Gray (*op. cit.* § 178) that *Lloyd v. Carew* (1697) Pre. Ch. 72, was the first decision which allowed this.]

*Limitations
to which
Rule applies*

1733. In particular, the Rule against Perpetuities applies to the following limitations, viz.: —

- (i) executory interests;

Cadell v. Palmer, *ubi sup.*
Re Lord Stratbeden, *ubi sup.*

- (ii) equitable contingent remainders;

Abbiss v. Burney (1880) 17 Ch. D. 211.

THE RULE AGAINST PERPETUITIES 1075

[The rule was said, in this case, to have been recognized for a long time; though no earlier decision was quoted. Obviously, the common law rule of 'failure' did not apply to equitable remainders; because the seisin was in the holders of the legal estate.]

(iii) copyhold contingent remainders;

[There seems to be no express decision on the point. But the reasoning in *Pickersgill v. Grey* (1862) 30 Beav. 352 is exactly the same as that of *Abbiss v. Burney*, *ubi sup.*; the freehold seisin being in the lord of the manor.]

(iv) covenants to convey;

L. & S. W. R. v. Gomm (1881) 20 Ch. D. 562.

[Probably, the covenant could be enforced by a purely personal action for damages; but not by a decree for specific performance.]

(v) options to purchase;

Corpn. of Worthing v. Heather [1906] 2 Ch. 532.

[Here again, the personal remedy is, probably, open to the person having the option.]

(vi) common law conditions (*ante*, Sect. III, Tit. I, § 1365).

Hollis' Hospital Case [1899] 2 Ch. 540.

Re Da Costa [1912] 1 Ch. 337.

(vii) restraints on anticipation (subject to § 1737, *post*);

Re Game [1907] 1 Ch. 276.

(viii) legal (socage) contingent remainders;

Re Ashforth [1905] 1 Ch. 535.

[This application of the rule was stoutly resisted by the more conservative type of legal mind; but it was assisted by the passing of the Contingent Remainders Act, 1877 (*ante*, Sect. I, Tit. VIII, § 1182). In *Re Frost* (1889) 43 Ch. D. 246, Kay, J., clearly foreshadowed the change, which was definitely adopted in *Re Ashforth*, *ubi sup.*]

(ix) creation of trusts for accumulation ;

Browne v. Stoughton (1846) 14 Sim. 369, recognized as law in *Re Earl of Stamford* [1912] 1 Ch., at p. 353.

[Of course the *duration* of trusts for accumulation is still more severely restricted (*post*, Tit. IV). Here it is the commencement of the trust which is restricted.]

(x) creation of charges *in futuro* ;

Edwards v. Edwards [1909] A. C. 275.

[It has been held by the Court of Appeal in Ireland, virtually overruling the earlier case of *Sulzer v. Rochford* [1906] 1 Ir. R. 399, that provisions for the extinguishment of charges are also within the rule (*Re Tyrrell's Estate* [1907] 1 Ir. R. 292; followed in *Re Donoughmore's Estate* [1911] 1 Ir. R. 211). There seems to be no doubt that *Re Tyrrell* is right on principle; inasmuch as the extinguishment of a charge must operate to confer a new interest in the property on some one else. But there seems to be no decision on the point in England.]

(xi) creation of future easements.

Sharpe v. Durrant (1911) 55 Sol. Jo. 423.

(xii) powers of appointment (see §. 1474).

*Limitations
to which the
Rule does not
apply*

1734. The Rule against Perpetuities does not apply to:—

- (i) mere personal covenants, even though the benefit of them is acquired by successive purchasers of land ;]

S. E. R. v. Associated Portland Cement [1910] 1 Ch. 12.

- (ii) rights of re-entry in leases ;

[This seems to be clearly recognized by implication by s. 11 (2) of the Conveyancing Act, 1882; and it is explained by Mr.

Gray (*op. cit.* § 303), on the ground that such right of re-entry is annexed to the reversion.]

- (iii) mere powers, not being powers of disposition ;

Re Earl of Stamford [1912] 1 Ch. 343.

- (iv) trusts for payment of debts ;

Ibid.

- (v) contracts for renewal in leases ;

Hare v. Burges (1857) 4 K. & J. 45.

[And, despite official doubts, it would seem that a reversionary lease is not within the rule merely because the existing lease has more than twenty-one years to run ; at any rate where it is granted to the existing lessee (*Mann v. Land Registrar* [1918] 1 Ch. 203).]

- (vi) limitations for charitable purposes, following upon the failure of previous charitable limitations.

Christ's Hospital v. Grainger (1848) 1 Mac. & G. 460.

Tyler v. Tyler [1891] 3 Ch. 252.

[The first limitation to a charity must clearly observe the rule (*Re Bowen* [1893] 2 Ch. 491; *Re Lord Stratheden* [1894] 3 Ch. 265).]

1735. The fact that a power of appointment con- *Powers of appointment*
templates persons outside the rule does not make the
power void ; if it could be, in accordance with the
terms of the settlement, and in fact is, exercised wholly
in favour of persons within it.

Griffith v. Pownall (1843) 13 Sim. 393.

Re Bowles [1905] 1 Ch. 371.

Davies' and Kent's Contract [1910] 2 Ch. 35.

[Of course, if the power is exercised in favour of a class, some of whom do, and some do not, violate the rule, the whole appointment is bad (*Re Game* [1907] 1 Ch., at p. 280, *per* Warrington, J.).]

*Limitations
after estates
tail*

1736. A limitation to take effect on the expiry of an estate tail is not on that account void for perpetuity; ^(a) and a limitation which, if it stood alone, would not be too remote, is not void merely because it is to take effect at some period after the expiry of an estate tail. ^(b)

- (a) *Faulkner v. Daniel* (1843) 3 Hare, 199.
Heasman v. Pearse (1871) L. R. 7 Ch. 275.
 (b) *Re Haygarth* [1912] 1 Ch. 510.

[The reason is, that an estate tail may always be barred, and all limitations after it thus destroyed (*ante*, Sect. I, Tit. III, § 1057); and so the land is not made inalienable.]

*Directions
to settle and
restraints on
anticipation*

1737. When a direction to settle, ^(a) or a restraint on anticipation, ^(b) is imposed upon a gift to the members of a class, and some of them are born at such a time as would make the direction, if carried out, valid, and some are not, the direction or restraint will be valid as to those who are so born, and invalid as to those who are not.

- (a) *Re Russell* [1895] 2 Ch. 698.
 (b) *Re Game* [1907] 1 Ch. 276.

*'Mere
machinery'*

1738. Where there is a limitation which does not contravene the Rule against Perpetuities, but the

mode of carrying it out prescribed by the settlor or the parties would, if followed, do so, the mode may be regarded as surplusage, and the limitation will be good.

Re Daveron [1893] 3 Ch. 421.

Re Appleby [1903] 1 Ch. 565.

Re Coulson's Trusts (1908) 97 L. T. 754.

TITLE IV—UNDER THE RULES AGAINST ACCUMULATION

Rule against accumulation

1739. Even though it does not violate the Rule against Perpetuities, any limitation which directs accumulation, whole or partial, of the rents, issues, produce, or profits of any property beyond one of the four alternative periods following is (subject to § 1741, *post*) void for the excess, ^(a) viz. :—

- (i) the life or lives of the disposer or disposers ; *or*,
- (ii) twenty-one years from the death of the disposer ; *or*,
- (iii) the minority or respective minorities of any person or persons who may be living or *en ventre sa mère* at the death of the disposer ; *or*,
- (iv) the minority or respective minorities of any person or persons who, under the trusts of the disposition would, for the time being, be entitled to the income directed to be accumulated.^(b)

(a) *Griffiths v. Vere* (1803) 9 Ves. 127.

(b) Accumulations Act, 1800, s. 1.

Re Cattell [1913] 1 Ch. 77. (This case shows that the minorities in question need not begin till long after the settlement takes effect.)

[This statute was the direct outcome of the famous case of *Thellusson v. Woodford* (1798) 4 Ves. 227 ; 13 Ves. 209, in which

the Court of Chancery, and, on appeal, the House of Lords, felt themselves bound to uphold the provisions of the will of Mr. Peter Thellusson, who directed the income of a large fortune (amounting to more than half a million sterling) to be accumulated during the whole of the period allowed by the Rule against Perpetuities (*ante*, Tit. II), for the benefit of the persons ultimately entitled to the corpus. The Act of 1800 did not affect to be retrospective; but some modification of Mr. Thellusson's will was eventually made by private Act of Parliament (3 & 4 Will. IV (1833) No. 27). It is, perhaps, worth pointing out, that a direction to accumulate during any part of the interest of an absolute owner in fee, for his ultimate benefit, would be void, as attempting to fetter the disposition of a fee (*Re Trevanion* [1910] 2 Ch. 538). See *ante*, Sect. I, Tit. II, § 1050.]

1740. In so far as such direction as is described in § 1739 is void, the rents, issues, produce, or profits which it directs to be accumulated will belong to the person or persons who would have been entitled thereto if such accumulation had not been directed. *Undisposed of surplus*

Accumulations Act, 1800, s. 1.

[This provision, as Lord Eldon pointed out in *Griffiths v. Vere*, *ubi sup.*, at p. 136, is by no means easy to interpret. But it seems now to be settled, that the surplus income goes, not to the persons who would have enjoyed the corpus of the property but for the direction, but as undisposed of by the settlement (*Re Perkins* (1909) 101 L. T. 345; *Re Garside* [1919] 1 Ch. 132).]

1741. The provisions of § 1739 have no application to directions touching: — *Exceptions from rule*

(i) payment of debts;

[It would appear that the debts in question need not be those of the settlor himself (*Re Hurlbatt* [1910] 2 Ch. 553), and that the accumulation for debts may be even beyond the limits of Perpetui-

ties (*Southampton v. Hertford* (1813) 2 Ves. & B., at p. 65, *per* Grant, M. R.; *Bateman v. Hotchkiss* (1847) 10 Beav. 426; *Re Earl of Stamford* [1912] 1 Ch. 343).]

- (ii) the raising of portions for children of the disposer or of any person taking any interest under the disposition;
- (iii) the produce of timber or wood upon any land.

Accumulations Act, 1800, s. 2.

Accumulation for investment in land

1742. It has not been lawful for any person, since 27th June, 1892, to make any disposition of any property, in such a manner that the income shall be accumulated, wholly or partially, for the purchase of land only, for any longer period than the minority or respective minorities of any person or persons who, if of full age, would, for the time being, be entitled under the disposition to such income.

Accumulations Act, 1892, s. 1.

[The very curious wording of this statute leaves the effect of disobedience to its provisions in a doubtful state. No penalty or alternative is prescribed. It is not even said that a disposition contrary to the terms of the statute will be invalid; though, presumably, this would be the case (*Re Danson* (1895) 13 R. 633). Finally, it may be pointed out that, though obviously framed with reference to the Act of 1800, the Act of 1892 contains no direction that it shall be read in connection with the earlier statute.]

SECTION XVI

CO-OWNERSHIP

TITLE I — GENERAL

1743. Co-ownership includes every kind of owner-*Definition*
ship by two or more persons which involves the un-
divided enjoyment of property, and, in the case of
the co-ownership of a present interest, in so far as
such interest is capable of possession, undivided pos-
session. The forms of co-ownership recognized by
English law are (i) joint ownership, (ii) ownership
in common, and (iii) in the case of real estate only,
co-parcenary. Owners of successive interests in the
same land are not co-owners.

Baring v. Nash (1813) 1 V. & B. 551.

[It may be noted that the assignee of any right comprised in a
copyright has, as respects the right assigned, and the assignor has, as
respects the rights not assigned, the same rights as an ordinary
owner of the copyright (*ante*, Sect. XIII, Tit. VII §§ 1681-1684).
(Copyright Act, 1911, s. 5 (3).) *Quære*: is this co-ownership?]

1744. The powers of co-owners of land and chat-*Powers of*
tels corporeal to bring actions for injury to their re-*co-owners*
spective rights, against one another and strangers, are
those specified in Bk. II, Pt. III, Sect. I, Tit. III,

§ 765; Sect. II, Tit. I, § 824, Tit. II, § 826, and Sect. III, Tit. II, § 875, *ante*; and the powers of co-contractors, in respect of the co-ownership of choses in action arising out of contract, those specified in Bk. II, Pt. I, Sect. VII, §§ 367–371, *ante*.

[One joint tenant or co-parcener may distrain in the name of all (*Robinson v. Hoffman* (1828) 4 Bing. 562 (joint tenants); *Leigh v. Shepherd* (1821) 2 Brod. & B. 465 (co-parceners)).]

*Account of
profits*

1745. Subject to § 1746 *post*, and to any agreement, express or implied, every co-owner is entitled to an account of the profits of the common property, with a view of obtaining his proper share.

Thornley v. Thornley [1893] 2 Ch. 229 } (joint tenants).
Dunbar v. Dunbar [1909] 2 Ch. 639 }
Baxter v. Hosier (1839) 5 Bing. N. C. 288 (owners in common).

[The old action of Account at common law involved the appointment of auditors, and was highly technical. Accounts are now taken before the Master in Chambers or the Official Referee of the Court.]

*Joint
patentees*

1746. Where, after the 31st December, 1907, a patent has been granted to two or more persons jointly, they are, unless (it is) otherwise specified in the patent, to be treated, for the purpose of the devolution of the legal interest therein, as joint owners. But, subject to any contract to the contrary, each of such persons is entitled to use the invention for his own profit without accounting to the others, but not

to grant a license without their consent; and, on the death of any such person, his beneficial interest devolves on his personal representative as part of his personal estate.

Patents and Designs Acts, 1907, s. 37.

[The rule that one co-owner of a patent need not account to the other or others was laid down in *Steers v. Rogers* [1893] A. C. 232.]

1747. Each co-owner of a patent^(a) or trade-mark^(b) has a separate right to sue alone for an injunction and damages, in respect of an injury to his rights by a third party.

Rights of co-patentees and co-owners of trade-marks

(a) *Sheehan v. G. E. R.* (1880) 16 Ch. D. 59; Patents and Designs Act, 1919, s. 10.

(b) *Dent v. Turpin* (1861) 2 J. & H. 139.

1748. Every co-owner of land has a right to a partition of the land, i. e. to a division of the land in severalty between himself and his co-owners.

Litt. 247 (co-parceners).

31 Hen. VIII (1539) c. 1 (estates of inheritance) } (joint tenants and
32 Hen. VIII (1540) c. 32 (estates for life or years) } tenants in common).
Copyhold Act, 1894, s. 37 (copyholds).

[Subject to § 1749, *post*, the right to partition is absolute (*Mayfair Co. v. Johnston* [1894] 1 Ch. 508). But a co-owner for a limited interest cannot (except under statutory powers (Settled Land Act, 1882, s. 3 (iv))) insist on a partition to endure beyond his interest (*Baring v. Nash* (1813) 1 V. & B. 551). The old method of partition was by a sheriff's jury, under the writ *De Partitione Facienda*; and the land was divided by metes and bounds. Owing to the inconveniences attending this method, it was superseded in

practice by a Commission in Chancery. Partition is now effected by a reference to Chambers, the writ of Partition having been abolished by the Real Property Limitation Act, 1833, s. 36. The right of a 'commoner' is not to partition, but, in certain cases, and subject to certain restrictions, to inclosure (see *ante*, Sect. I, Tit. IX, § 1210). It is remarkable that there appears to be no means of enforcing a partition (or even a sale and division of the proceeds) of pure personalty.]

*Sale in lieu
of partition*

1749. In an action by co-owners of land for partition or a sale and distribution of the proceeds,^(a) the Court may, on request of any of the parties interested, if it thinks that a sale and distribution of the proceeds would be more beneficial for the parties than a division of the property, order a sale accordingly.^(b) If a sale and distribution are requested by a party or parties interested to the extent of one moiety of the value of the property, the Court must, unless it sees good reason to the contrary, direct a sale accordingly.^(c) When any party interested requests a sale, the Court may, if it thinks fit, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting the sale, direct a sale accordingly.^(d)

(a) Partition Act, 1876, s. 7.

(b) Partition Act, 1868, s. 3.

(c) *Ibid.*, s. 4.

(d) *Ibid.*, s. 5.

[It is not quite easy to distinguish between the first and third alternatives. Probably the first only applies where a partition would be manifestly difficult or disadvantageous, while the third is intended to cover cases in which the merits of the rival processes are more even. It will be observed, that the Court has no power under the

Acts to order a sale against the wish of all parties. The Acts contain many useful improvements in the procedure of partition actions.]

1750. (*Semble*) When there is a conveyance of property to a husband and wife and others, whether as joint owners or owners in common, it is a question of construction whether the husband and wife take only a single share, or each a share equal to that of each of the others. *Share of husband and wife*

Litt. s. 291, followed by
Re March (1883) 24 Ch. D. 222.
Re Jupp (1888) 39 Ch. D. 148.
Re Dixon (1889) 42 Ch. D. 306.
Re Jeffery (1914) 110 L. T. 11.

[*Semble*: Since the passing of the Married Women's Property Act, 1882, the husband and wife, if they take a single share, will now, as between themselves, stand in the same relation as the other co-owners (*Thornley v. Thornley* [1893] 2 Ch. 229; *Dunbar v. Dunbar* [1909] 2 Ch. 639). Before the Act, a conveyance of real estate to husband and wife, not for her separate use, in words which would, in the case of strangers, have made them joint tenants, made them 'tenants by entireties.' The husband was sole tenant during the marriage; but neither one nor both could destroy the wife's right of survivorship (*Thornley v. Thornley*, *ubi sup.*, at p. 233, *per* Romer, J.). In the case of chattels, before the Married Women's Property Act, the husband would have got all.]

TITLE II—JOINT OWNERSHIP

How created **1751.** Any conveyance or transfer of property to two or more persons, without words of severance, will (subject to §§ 1752, 1754, 1755, *post*) create a joint ownership in such persons. The interests of all joint owners must be of the same extent and duration.

Litt. s. 277 (land).

Cock v. Burrough (1686) 1 Vern. 425

Lady Shore v. Billingsley (1687) *ibid.*, 482 } (chattels).

Morley v. Bird (1798) 3 Ves. 628.

[Joint owners are said to have four unities, viz. (i) interest, (ii) title, (iii) time, and (iv) possession. But, since the passing of the Statute of Uses (1535), it has been possible, by means of future uses, to make the interests of joint tenants of land vest at different times, so long as the seisin out of which they arise is conferred *uno actu*; e. g. by a limitation to the use of all the children of A, born and to be born (*Stratton v. Best* (1787) 2 Bro. C. C. 233).]

Joint entails **1752.** A conveyance of land to two persons who cannot possibly intermarry, or to three or more persons, and the heirs of their bodies,^(a) will make such persons joint tenants for life, with remainder to them as tenants in common in tail of equal shares.^(b) But a similar conveyance to two persons who might possibly intermarry, will make

such persons tenants in tail special (*ante*, Sect. I, Tit. III, § 1054).^(c)

- (a) Presumably, the same effect would be produced by the use of the modern form 'in tail.'
- (b) Litt. ss. 283, 284.
Co. Litt. 184 a.

[It is said by Coke (Co. Litt. 182 b) that neither can convey away his remainder during his life. But the case quoted in Coke's learned editor, Butler (viz. *Huntley's Case* (1572) Dyer, 326 a) certainly does not bear out this remarkable statement; and Coke himself quotes no authority. Why should not each tenant in tail disentail his own share? (Fines and Recoveries Act, 1833, s. 23; *Tufnell v. Borrell* (1875) L. R. 20 Eq. 196).]

- (c) Co. Litt. 20 b.

1753. On the death of one joint owner, his interest passes (subject to §§ 1754–1756, *post*) to the surviving joint owner or owners; notwithstanding any disposition by the testament of the deceased joint owner. *Right of survivorship . . .*

Litt. ss. 280–282, 287.

[This is the most characteristic feature of joint ownership; and, while it makes that form of ownership highly convenient in some cases (e. g. for the interests held by trustees, who are invariably made joint owners), in others it tends to work injustice. Various modifications (§§ 1754–1756, *post*) have been introduced to meet the latter difficulty.]

1754. When property is vested in two or more *Partners* persons jointly as partners in trade or business, for any legal interest, that interest will, on the decease of one of them, survive to the other or others. But

N N 2

such other or others will, so far as necessary, be deemed trustees for the deceased partner's representatives of the beneficial interest (if any) which belonged to the deceased partner at the time of his death.

Partnership Act, 1890, s. 20 (2) (land).

Co. Litt, 182 a.

Jeffereys v. Small (1683) 1 Vern. 216.

Morley v. Bird (1798) 3 Ves., at p. 631, *per* Arden, M. R. } (chattels).

[The language of reporters and text-writers would sometimes lead one to think that, even at law, in the case of chattels, there was no survivorship. But the inconvenience of such a doctrine would be so great, that it is better to assume that only equitable interests are affected by the special rule. As to land, the Partnership Act is admirably clear.]

*Joint mort-
gagees*

1755. When a single sum of money is advanced on mortgage by two or more persons, whether in equal or unequal shares, such persons are presumed to be owners in common of the mortgage money in proportion to their respective contributions; even though the security is conveyed to them as joint owners.^(a) And, even if it is expressly stated in the mortgage that the money belongs to the mortgagees on a joint account in equity as well as at law, parol evidence of facts (but not of mere statements of intention)^(b) will be admitted to show that it was intended that the money should belong beneficially to the mortgagees as tenants in common.^(c)

(a) *Petty v. Styward* (1631) 1 Rep. in Cha. 31.

Rigden v. Vallier (1751) 2 Ves. Sr., at p. 258, *per* Lord Hardwicke, C.

Morley v. Bird (1798) 3 Ves., at p. 631, *per* Arden, M. R.

Robinson v. Preston (1858) 4 K. & J., at p. 511, *per* Wood, V. C.

(b) *Harrison v. Barton* (1860) 1 J. & H., at p. 294, *per* Wood, V. C.

[This was a case of joint purchase; but, *semble*, the rule must be the same for mortgages. Such a statement protects the mortgagor who pays the debt to the survivor or survivors (Conveyancing Act, 1881, s. 61 (1).]

(c) *Re Jackson* (1887) 34 Ch. D. 732.

1756. There is no such presumption as that stated in § 1755 in the case of joint purchasers, who contribute equally to the purchase money. But, even in such cases, parol evidence of facts may be admitted to show the intentions of the parties.^(b) And purchasers who contribute unequally to the purchase money are presumed to be beneficially interested, as owners in common of the property purchased, in proportion to the amounts of their respective contributions.^(c) *Joint purchasers*

(a) *Lake v. Gibson* (1729) 1 Eq. Ca. Ab. 291.

Aveling v. Knipe (1815) 19 Ves. 441.

Garrick v. Taylor (1860) 29 Beav. 79.

Harris v. Ferguson (1848) 16 Sim. 308.

Robinson v. Preston (1858) 4 K. & J., at p. 510, *per* Wood, V. C.

[In *Harris v. Ferguson*, *ubi sup.*, the contribution was unequal; and yet the purchasers were held joint owners. But the circumstances were special. The rule in the text does not apply to a purchase of the equity of redemption by mortgagees who are owners in common of the mortgage money (*Edwards v. Fashion* (1712) Pre. Cha. 33).]

(b) *Harrison v. Barton* (1860) 1 J. & H. 287.

(c) *Lake v. Gibson*, *ubi sup.*

Robinson v. Preston, *ubi sup.*

*Express
severance*

1757. Any valid alienation, legal or equitable,^(a) of the share of any joint owner, whether to a person not being a joint owner with him, or to one of two or more being joint owners with him, works a severance of the legal or equitable interest, respectively, in such share, and makes the alienee an owner in common with the other joint owner or owners.^(b) But (*semble*) a mere demise for years of a joint share at a rack rent does not effect a severance of the reversion.^(c)

- (a) E. g. a covenant to settle on marriage (*Caldwell v. Fellowes* (1870) L. R. 9 Eq. 410; *Re Hewett* [1894] 1 Ch. 362), or a contract to sell (*Brown v. Raindle* (1796) 3 Ves., at p. 257, *per Arden*, M. R.), or an equitable charge on a reversionary interest (*Re Sharer* (1912) 57 Sol. Jo. 60).
- (b) Litt. s. 294, 304. (But the alienation only affects the share of the alienor; and, if there were two or more other joint owners, they will continue to be such, as regards one another.)
- (c) *Palmer v. Rich* [1897] 1 Ch. 134. (Warrington, J., however, in *Napier v. Williams* [1911] 1 Ch., at p. 369, thought there would be a severance as to the term.)

[Even in the case of a woman married before 1882, marriage of a female joint tenant did not of itself work a severance of her share, either in freeholds or leaseholds (*Palmer v. Rich*, *ubi sup.*). And it is doubtful whether there can be a severance of a joint ownership of a legal chose in action (*Re McKerrrell* [1912] 2 Ch., at p. 653).]

*Implied
severance*

1758. Any circumstances from which it may be inferred that joint owners have agreed to treat the joint ownership as at an end, without converting their interests into severalty, will (subject to § 1757) work a severance of their beneficial interests.

Williams v. Hensman (1861) 1 J. & H. 546.
Palmer v. Rich, *ubi sup.*

TITLE III — OWNERSHIP IN COMMON

1759. Any conveyance or transfer of property *Original creation* (*semble*) other than a legal chose in action ^(a) to two or more persons with words of severance, ^(b) or with express direction to hold in common, will (subject to Tit. I, § 1746, *ante*) create ownership in common between such persons. Owners in common may have unequal though undivided shares; ^(c) and there is no right of survivorship amongst them. ^(d)

- (a) Before the Judicature Act, 1873, s. 25 (6), there could not have been a legal ownership in common of a legal chose in action in the nature of a debt (*Re McKerrell* [1912] 2 Ch., at p. 653); and, regard being had to *Forster v. Baker* (*ante*, Sect. XIV, Tit. I, § 1698, n. (a)), it seems doubtful whether the Act has altered the law in that respect. For the present rights of co-owners of a patent, see *ante*, Tit. I, §§ 1746, 1747.
- (b) Such words are 'equally to be divided' (*Hood v. Stokes* (1753) 1 Wils. 341), 'share and share alike' (*Rigden v. Vallier* (1751) 2 Ves. Sr., at p. 256, *per* Lord Hardwicke, C.), 'equally,' 'among,' 'between,' (*Morley v. Bird* (1798) 3 Ves., at 631, *per* Arden, M. R.).
- (c) Litt. s. 294.
Sturton v. Richardson (1844) 13 M. & W. 17.
- (d) Litt. s. 321.

1760. Ownership in common may also be created *Creation by severance* by any act or series of acts which works a severance of a joint ownership, ^(a) or by an alienation by an owner in severalty of any share in his ownership to

another to be held in undivided ownership with him.^(b)

(a) *Ante*, Tit. II, §§ 1757, 1758.

(b) Litt. s. 298.

*Limitation
in remainder*

1761. A limitation of land by way of contingent remainder (*ante*, Sect. I, Tit. VIII, § 1172) to the heirs, or the heirs of the body, of two living persons who cannot intermarry, makes such heirs, if they take at all, tenants in common without words of severance.

Justice Windham's Case (1589) 5 Rep., at 8a.

Nightingale v. Quartley (1787) 1 T. R. 630.

[*Semble*: if the limitation were executory, the heirs might take as joint tenants (*ante*, Tit. II, § 1751 n.).]

TITLE IV — CO-PARCENARY

1762. Where, under the law of inheritance, real estate descends upon two or more persons as co-heirs of the purchaser or person last entitled, such persons are said to hold the estate as co-parceners. *How created*

Litt. s. 241.

Inheritance Act, 1833, s. 2.

Law of Property Amendment Act, 1859, s. 19.

[The rules of inheritance are dealt with in Book V, *post*. Broadly speaking, all females in the same degree of inheritance take equally at common law; and also all males in the same degree in gavelkind.]

1763. There is no right of survivorship among co-parceners; but the co-parcenary continues by descent until a co-parcener alienes his or her share.^(a) *No survivorship*
The alienee then holds as tenant in common with the other co-parcener or co-parceners; but the latter, if more than one, continue (until severance) to hold as co-parceners among themselves.^(b)

(a) Co. Litt. 164.

(b) Litt. 262.

Co. Litt. 173 b.

1764. The shares of co-parceners are distinct, though undivided; and, notwithstanding the Inheritance *Distinct sharer*

tance Act, 1833, will descend separately to the heirs of each co-parcener.

Cooper v. France (1850) 19 L. J. Ch. 313.

[S. 2 of the Inheritance Act, 1833, provided that descent should in all cases be traced from the purchaser. G purchased land and died, leaving two daughters, E and S. E died intestate, leaving one son; and it was contended that he and S, the surviving daughter of G, each inherited one half of E's moiety, as co-heirs of G. But the Court held that E's son took the whole of E's share. It is, however, quite clear that, in the second generation, the shares of co-parceners need not necessarily be equal (Co. Litt. 164 b).]

SECTION XVII

FIDUCIARY OWNERSHIP (TRUSTS)

TITLE I—GENERAL

1765. A trust is an obligation to hold and administer or deal with property conscientiously for the benefit of a person or persons other than the person subject to the obligation. *Definition*

Re Williams [1897] 2 Ch., at p. 19, *per* Lindley, L. J.

[The origin of the 'use, trust, or confidence' has been briefly described in Sect. I, Tit. XI, § 1304 n.; where it is pointed out that, by means of a strict judicial interpretation of the Statute of Uses, three classes of uses escaped the operation of that statute, and remained, under the name of 'trusts,' still recognized only by Courts of Equity. To these, later developments added other equitable interests; but by far the most important example of equitable interests is still the trust, which has extended beyond its original scope as a scheme for the protection of beneficial interests in land from the rigorous requirements of the common law, and is now freely applicable to all classes of beneficiaries and all kinds of proprietary rights. Every completely constituted trust must contain four elements, viz. (i) a trustee or trustees, (ii) a beneficiary or beneficiaries (*cestui que trustent*), who may include the or a trustee or trustees, but must not be identical with him or them, (iii) property the subject matter of the trust, and (iv) an obligation, enforceable in a Court of Equity, on the trustee or trustees to administer or deal with the property for the benefit of the beneficiaries (*Knight v. Boughton* (1844) 11 Cl. & F., at p. 551, *per* Lord Cottenham; *Re Williams* [1897] 2 Ch., at p. 19, *per* Lindley, L. J.). The passing of the Judicature Acts, though it has made all branches of the Supreme Court tribunals administering both law and equity, has

not (at least directly) affected the peculiar position of trusts as equitable interests based on conscientious obligation. Where no such obligation can be enforced against the legal owner of the property alleged to be the subject matter of the trust, there is no trust. And a beneficiary of full age and capacity, absolutely entitled to the trust property, or even (in the case of pure personalty) an undivided share thereof, can call upon the trustee to convey to him the legal ownership, and thus put an end to the trust (*Re Marshall* [1914] 1 Ch. 192).]

*Peculiar
trusts*

1766. Generally speaking, every trust imposes upon the trustee a specific obligation to fulfil the express directions of the trust. But—

- (i) a trust may be so constituted as to leave it entirely to the discretion of the trustee in what manner and to what extent it shall be carried out ('discretionary trust');

Wainford v. Heyl (1875) L. R. 20 Eq. 321.
Train v. Clapperton [1908] A. C. 342.

[In these cases, so long as the trustees act *bonâ fide*, they cannot be interfered with. But the surplus of the property (if any) cannot be claimed by the trustee beneficially.]

- (ii) property may be disposed of in such a way as to authorize the takers to expend the whole or part of it, at their discretion, for the maintenance of specific animals or non-sentient objects;

Re Dean (1889) 41 Ch. D. 552.

[Of course, only a human being can enforce a trust; but, in *Re Dean*, it was held that the so-called trustees, if they did not carry out the direction, could not retain the property for their own benefit. But such a provision must observe the Rule against Perpetuities (*Re Jones* (1898) 79 L. T. 154).]

- (iii) in the case of a charitable trust, the choice of the institutions or objects to be benefited, as well as the mode of carrying out the trust, may be left entirely to the trustee or to the Court.

Re Allen [1905] 2 Ch. 400.

Re Garrard [1907] 1 Ch. 382.

A.-G. v. Mathieson [1907] 2 Ch. 383.

[But if there is any liberty to expend an unspecified part of a fund so left on objects not charitable, the whole trust will be bad for uncertainty (*Re Sidney* [1908] 1 Ch. 488; *Dunne v. Byrne* [1912] A. C. 407).]

1767. It is a question of construction for the Court in each case, whether words of advice or entreaty accompanying a gift of property are intended to create a trust binding on the donee, or are mere expressions of the wishes of the donor, which have no legal effect. *Precatory trusts*

Comiskey v. Bowring-Hanbury [1905] A. C. 84.

Re Conolly [1910] 1 Ch. 219.

Re Atkinson (1911) 80 L. J. Ch. 370.

[Such questions arise almost exclusively on testamentary gifts; and the tendency of the Courts is now against the recognition of 'precatory trusts' (*Re Atkinson*, *ubi sup.*, at p. 372, *per* Cozens-Hardy, M. R.).]

1768. A trust may be created by express words ('express trust'), by conduct of the parties ('implied trust'), or by operation of law ('constructive trust').^(a) No technical language or special form is necessary to *Classification of trusts*

create an express trust; ^(b) except that a trust of lands, tenements, or hereditaments, must be manifested and proved by some writing signed by the party who is by law entitled to declare such trust, ^(c) and that no testamentary trust can be created, except by testament executed in conformity with the requirements of the Wills Act, 1837. ^(d)

(a) *Soar v. Ashwell* [1893] 2 Q. B. 390. (As was pointed out in this case, these distinctions are not always consistently employed.)

(b) *Re Atkinson* (1911) 80 L. J. Ch., at p. 371, *per* Cozens-Hardy, M. R.

(c) Statute of Frauds (1677) s. 7.

[It will be observed that an express trust of lands need not be created by writing. It is sufficient if it is 'manifested and proved' by writing, which may be drawn up long after the creation of the trust (*Forster v. Hale* (1798) 5 Ves. 308); and the requirements of the statute do not extend to implied or constructive trusts (*ibid.*, s. 8).]

(d) The Court will not allow a devisee or legatee to retain for his own benefit property as to which he was clearly informed before the testator's death that it was intended to be held by him for the benefit of other persons (*Tee v. Ferris* (1856) 2 K. & J. 357; *McCormick v. Grogan* (1869) L. R. 4 H. L. 82; *Re Maddock* [1902] 2 Ch. 220). But such knowledge only binds persons who acquired it before the testator's death, even if the others are devisees in common with them (*Tee v. Ferris, ubi sup.*); and if they refuse to undertake the trust, or the object of the trust is unlawful, there are no means of enforcing it. Where there is a devise to joint devisees, and one of them was informed of the trust before the making of the testament, his knowledge binds both (*Russell v. Jackson* (1852) 10 Hare, 204); if his knowledge was acquired between the making of the testament and the testator's death, he only is bound (*Re Stead* [1900] 1 Ch. 237).

*Imperfectly
constituted
trusts*

1769. Where there has been an imperfect attempt to constitute a valid trust, and the attempt has failed,

either from the omission of some formality,^(a) or because the property intended to be the subject matter of the trust was not then in existence,^(b) the Court will not enforce the completion of the trust, except on the application of persons who have given (or are deemed to have given) ^(c) valuable consideration.

(a) *Milroy v. Lord* (1862) 4 De G. F. & J. 264.

Richards v. Delbridge (1874) L. R. 18 Eq. 11.

[These were cases of imperfect assignments, intended to pass the ownership of the property. But a binding trust may clearly be created without assignment of property, if the settlor declares himself, in unmistakable terms, to hold the property in trust for the beneficiaries (*Wheatley v. Purr* (1837) 1 Keen, 551).]

(b) *Re Ellenborough* [1903] 1 Ch. 697.

(c) e. g. children under a marriage settlement. (But, if the trust is enforced by a purchaser for value, it will enure also for the benefit of volunteers, at any rate as against the settlor and his representatives (*Davenport v. Bishop* (1846) 1 Ph. 698).)

1770. Subject to § 1769, an implied trust will be deemed to have been created whenever, from the conduct of the parties to a transaction involving the transfer or dealing with property, the Court considers that it was the intention of the parties that a trust should be created. In particular : —

Implied trusts

- (i) when, by direction of a purchaser of property, the conveyance of such property is made to a third person, not being a person *in loco filii* of the purchaser, such third person will be presumed to be a trustee for the purchaser ;

Ryall v. Ryall (1739) 1 Atk. 59.

[Where the transferee is *in loco filii* of the purchaser, the transaction is deemed to be an advancement by the latter for the benefit of the transferee (*Dyer v. Dyer* (1788) 2 Cox, 92).]

- (ii) when the owner of pure personalty transfers it into the names of himself and a stranger (being a volunteer), a resulting trust for the benefit of the transferor will be presumed, in the absence of evidence to the contrary;

Marshall v. Crutwell (1875) L. R. 20 Eq. 328.

Re Eykyn's Trusts (1877) 6 Ch. D. 115.

Standing v. Bowring (1885) 31 Ch. D., at p. 287, *per* Cotton, L. J.

[*Semble*: the rule has no application to land; and a transfer into the names of a transferor and a person *in loco filii* towards him raises a presumption of advancement (*Re Eykyn's Trusts*, *ubi sup.*). Formerly a wife stood in such a position towards her husband; and, *semble*, the passing of the Married Women's Property Act, 1882, has not made any difference in this respect (*Dunbar v. Dunbar* [1909] 2 Ch. 639). It seems much more difficult to say whether or not the Act has enabled the presumption of advancement to be raised in the case of a transfer or purchase by a married woman (*Re Ashton* [1897] 2 Ch. 574).]

- (iii) when, either from the failure of the beneficiaries, the failure or illegality of the objects of the trust, the vagueness or incompleteness of the directions given to the trustees, or otherwise, the primary purposes of a trust have ceased to exist, or have never existed, there will be an implied or 'resulting' trust of the undisposed of property, for the benefit of the settlor or his representatives.

Ackroyd v. Smithson (1780) 1 Bro. C. C. 502.

Page v. Leapingwell (1812) 18 Ves. 463.

Merchant Taylors' Co. v. A. G. (1871) L. R. 6 Ch. App., at p. 518,
per James, L. J.

[Formerly, in the case of land, if the settlor and his representatives failed, the trustees could retain the property for their own benefit (*Burgess v. Wheate* (1757) 1 Ed. 177). But the Crown now claims under the Intestates' Estates Act, 1884, s. 4. And the Crown was always entitled, in such cases, to pure personalty, as *bona vacantia* (*Re Gosman* (1880) 15 Ch. D. 67). Care must, however, be taken to distinguish between a trust, and an absolute gift with mere directions as to user (*Re Andrews' Trust* [1905] 2 Ch. 48), or a similar gift subject simply to charges (*King v. Denison* (1813) 1 V. & B. 260). In such cases, the donee is entitled to retain the gift, notwithstanding the impossibility of carrying out the directions, or the satisfaction of the charges. And, where a settlor has transferred property to trustees for the purpose of carrying out an illegal object, the settlor may find it impossible to recover the property, if the illegal purpose or any substantial part of it has been carried out (*Re Great Berlin Steamboat Co.* (1884) 26 Ch. D. 616).]

1771. A mere voluntary conveyance, either of land or (*semble*) of pure personalty, to a stranger, does not, of itself, raise any presumption of a resulting trust. *Voluntary conveyance*

Lloyd v. Spillet (1740) 2 Atk. 148 (land).

Young v. Peachey (1741) *ibid.*, 248.

George v. Bank of England (1819) 7 Price, 651, per Richards, C. B. (personalty). But see

Fowkes v. Pascoe (1875) L. R. 10 Ch. App. 343.

1772. A constructive trust arises when a trustee has received, in his capacity as such, property which, though not comprised in an express trust, he is not *Constructive trust*

legally entitled to retain for his own benefit,^(a) or where a stranger to the trust has received property belonging to the trust in circumstances which do not entitle him to retain it as against the beneficiaries.^(b) Such property is held subject to a constructive trust for the beneficiaries, under, and on the terms of, the original trust.

- (a) *Keech v. Sanford* (1726) Sel. Ca. Cha. 61.
Griffith v. Owen [1907] 1 Ch. 195.

[A trustee is not, in the absence of special circumstances, allowed to make a profit out of his trust; and will be compelled to account, for the benefit of the trust, even for incidental gains. The cases in which this rule is applied are stated in Tit. III., § 1796, *post*.]

- (b) *Soar v. Ashwell* [1893] 2 Q. B., at p. 405, *per* Kay, L. J.
Smith v. Patrick [1901] A. C. 282.

Trust for unlawful purposes

1773. Any trust which has for its substantial aim the achievement of any illegal purpose, is void as regards that purpose, and, if such purpose is inextricably mixed up with the other purposes of the trust, is void altogether. But where the substantial purpose of the trust may be achieved without violating the law, any illegal means prescribed for the attainment of such purpose may be disregarded, and the trust will be valid ('mere machinery').

- Re Daveron* [1893] 3 Ch. 421.
Re Appleby [1903] 1 Ch. 565.
Re Coulson's Trusts (1908) 97 L. T. 754.
Re Ludwig [1916] 2 Ch. 26.

[Does the latter part of this rule apply to any defect other than a perpetuity? For the application of the Rule against Perpetuities to charitable trusts, see *ante*, Sect. XV, Tit. III, § 1734 (vi). It

should be noted, that a trust which in itself is free from illegality, is not made void by the fact that it was made from an illegal motive or for an illegal consideration (*Ayerst v. Jenkins* (1873) L. R. 18 Eq. 275). But see *Phillips v. Probyn* [1899] 1 Ch. 811, which seems difficult to reconcile with the earlier case.]

1774. The Court has power to enforce trusts against persons within its jurisdiction; even though the property subject to the trust is situated outside the jurisdiction.^(a) But the Court cannot directly affect or control immovables outside the jurisdiction;^(b) and it will not, as a rule, adjudicate on questions relating to the title or right to the possession of immovable property out of the jurisdiction, unless there exists between the parties to the action some personal relation arising out of contract or implied contract, fiduciary relationship, or fraud.^(c)

- (a) *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444 (land).
Ewing v. Orr-Ewing (1885) L. R. 10 App. Ca. 453 (personalty).
Re Smith [1913] 2 Ch. 216 (land).
(b) *Re Piercy* [1895] 1 Ch. 83.
(c) *Deschamps v. Miller* [1908] 1 Ch., at p. 863, *per* Parker, J.

TITLE II — APPOINTMENT AND REMOVAL OF TRUSTEES

*Who may be
a trustee*

1775. Any person, corporate^(a) or individual, including a minor,^(b) a married woman,^(c) a bankrupt,^(d) and a convict,^(e) is capable of being a trustee ; but no one can be compelled to become a trustee against his will.^(f)

(a) *Re Thompson's Settlement* [1904] W. N. 205.

[The most conspicuous example of a corporate trustee is, of course, the Public Trustee appointed under the Public Trustee Act, 1906.]

(b) But a minor's powers as a trustee are restricted by the fact that he cannot (with certain exceptions) make a binding conveyance of land (*ante*, Sect. VII, Tit. I, § 1497). This defect may be cured by means of vesting orders under s. 26 (ii) of the Trustee Act, 1893 ; or a new trustee may be appointed by the Court, under s. 25 of that Act.

(c) Married Women's Property Act, 1907, s. 1 (1). And her husband is not liable for her breach of trust, unless he has acted in the trust (M. W. P. Act, 1882, s. 24).

(d) It is expressly provided by the Bankruptcy Act, 1914 (s. 38 (1)), that the property held by a bankrupt as trustee shall not be divisible among his creditors. But a bankrupt and a felon trustee may be removed by the Court under s. 25 of the Trustee Act, 1893.

(e) *Ibid.*, s. 48.

[A lunatic trustee may also be removed by the Court, and a vesting order made, transferring the property (Lunacy Act, 1911, s. 1).]

(f) *Re Ridley* [1904] 2 Ch., at p. 774.
Re Bennett [1906] 1 Ch. 216.

[The rule applies ; even where the trust estates pass to the personal representatives of a trustee under s. 30 of the Conveyancing Act, 1881. The representatives, though they are owners of the trust property, are not trustees ; but, until the appointment of new

trustees, they can exercise the powers of the deceased (Conveyancing Act, 1911, s. 8), and they may take under a gift to 'the trustees for the time being' of the settlement (*Re Waidanis* [1908] 1 Ch. 123). A person who wrongfully intermeddles with trust property is called a 'trustee *de son tort*.' He incurs the liabilities, but has not the rights, of a trustee (*Re Barney* [1892] 2 Ch. 265).]

1776. A trustee may be appointed : —

*Appointment
of trustee*

- (i) by the settlor in the settlement creating the trust ;

[This is the normal method of original appointment, and must, probably, observe the rules specified in § 1768, *ante*.]

- (ii) by the person nominated for the purpose by the settlement (*post*, § 1777) ;

Trustee Act, 1893, s. 10 (1).

[Unless the settlement otherwise provides, this power cannot, of course, be exercised, except to supply a vacancy among the trustees. But, if the wording of the power is not inconsistent, the donee of the power may appoint himself (*Montefiore v. Guedalla* [1903] 2 Ch. 723).]

- (iii) if there is no such person, or no such person able or willing to act, then, subject to the terms of the settlement, by the surviving or continuing trustee or trustees, or, if there is no such person, by the personal representatives of the last surviving or continuing trustee ;

Ibid.

[The appointment under this provision must be in writing (*ibid.*). The representative of a last surviving trustee cannot appoint himself a trustee under this provision (*Re Sampson* [1906] 1 Ch. 435). *Quare*: is this decision affected by s. 8 (1) of the Conveyancing Act, 1911 ?]

(iv) by the Court, whenever it is expedient to appoint a new trustee or trustees, and it is found inexpedient, difficult, or impracticable, to do so without the assistance of the Court.

Trustee Act, 1893, s. 25 (1).

[This section is particularly applicable in the case of bankrupt and convict trustees (*ante*, § 1775 n. (d)). But the Court will not exercise its powers if there is any other person able and willing to act (*Re Higginbotham* [1892] 3 Ch. 132; *Re Firth* [1912] 1 Ch. 806).]

*Discharge of
trustee*

1777. Where a trustee, whether original or substituted, and whether appointed by the Court or otherwise, remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act, or is incapable of acting, therein, the person or persons having under the instrument creating the trust power to appoint new trustees, or, failing them, the persons specified in § 1776 (iii) *ante*, may, by writing, appoint another trustee in his place.^(a) Subject to this provision, a trustee can only be removed by the order of the Court.^(b)

(a) Trustee Act, 1893, s. 10 (1).

(b) Even the Court cannot remove a trustee who desires to continue in office; except for good reasons (*Re Blanchart* (1861) 3 De G. F. & J. 131).

[It will be noticed that even this statutory provision does not formally authorize the removal of a trustee; though, doubtless, the appointment of a substitute has substantially that effect.]

1778. Generally speaking, a trustee may not retire without the leave of the Court; except in pursuance of a power in the settlement, or with the consent of all persons interested in the settlement, being of full age and capacity.^(a) But, subject to the terms of the instrument, if any, creating the trust, where there are more than two trustees, or where the Public Trustee is acting as a trustee of the settlement,^(b) if a trustee by deed declares that he is desirous of being discharged from the trust, and if his co-trustees or trustee, and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of such trustee, and to the vesting in the co-trustee alone of the trust property, the trustee desirous of being discharged will be deemed to have retired from the trust, and will by the deed be discharged therefrom.^(c)

*Retirement
of trustee*

(a) *Wilkinson v. Parry* (1828) 4 Russ. 272.

[But, apparently, the Court will make the order as of course, on being satisfied that the trustee's accounts are in order; though, in the event of the trustee having acted capriciously, he will be ordered to pay the costs of the application (*Forshaw v. Higginson* (1855) 20 Beav. 485). And it is not always necessary to appoint a new trustee in place of the retiring trustee (*Re Chetwynd's Settlement* [1902] 1 Ch. 692).]

(b) Public Trustee Act, 1906, s. 5 (2).

(c) Trustee Act, 1893, s. 11.

1779. Where new trustees are appointed under § 1776 (ii) and (iii) *ante*, the number of trustees

*Not less than
two trustees*

must not be allowed to fall below two; unless only one trustee was originally appointed,^(a) or unless the settlement authorizes the acting of a sole trustee,^(b) or unless the Public Trustee is acting as a trustee of the settlement.^(c)

(a) Trustee Act, 1893, s. 10 (2) (c).

(b) *Ibid.*, s. 10 (5).

(c) Public Trustee Act, 1906, s. 6 (1).

[But the Public Trustee must not be appointed a trustee by any one but the settlor without an order of the Court, if the settlement contains a direction to the contrary (*ibid.*, s. 5 (3)); and, even where there is no such direction, the Court may, on the application of a beneficiary, prohibit the appointment of the Public Trustee (*ibid.* (4)). Generally speaking, the *onus* is on the party proposing the appointment of the Public Trustee (*Re Hope Johnstone* (1909) XXV T. L. R. 369, *per* Parker, J.; *Re Firth* [1912] 1 Ch. 806). And notice must be given to all parties beneficially interested of any proposal to make such an appointment (Public Trustee Act, 1906, s. 5 (4)).]

*Judicial
trustee*

1780. The Court may, on application by a settlor or intending settlor, or by any trustee or beneficiary, in its discretion appoint a judicial trustee, either as a sole or joint trustee, and, if sufficient cause is shown, in place of all or any existing trustees. Such person may be either a fit and proper person nominated in the application, or, in the absence of such nomination, or if the Court [is not satisfied with the fitness of the person so nominated, an official of the Court.^(a) In either case, the judicial trustee will be subject to the control and supervision of the Court, which may give him any general or special direction in regard to the

trust or the administration thereof.^(b) The Public Trustee may be appointed a judicial trustee under this §.^(c)

(a) Judicial Trustees Act, 1896, s. 1 (1).

(b) *Ibid.* (3) (4).

(c) Public Trustee Act, 1906, s. 2 (1) (a).

[A retiring judicial trustee has no power to appoint a successor under s. 10 of the Trustee Act, 1893 (*Re Johnston* [1911] W. N. 234).]

TITLE III—DUTIES OF TRUSTEES

*To carry out
settlement
and exercise
diligence*

1781. It is the duty of a trustee to administer the trust property in accordance with the directions of the settlement; ^(a) and, in so far as the settlement is silent, according to the standard of diligence and discretion approved by the Court for the conduct of trustees. ^(b)

- (a) *Parkes v. Royal Botanic Society* (1908) XXIV T. L. R. 508.
Cross v. Lloyd-Graeme (1910) 102 L. T. 163.
Re Whiteley (1911) 55 Sol. Jo. 291.

[Only in cases of obvious necessity, and to carry out the settlor's substantial wishes, will the Court sanction a departure from the terms of the settlement (*Re New* [1901] 2 Ch. 534 — described by Cozens-Hardy, L. J., in *Re Tollemache* [1903] 1 Ch., at p. 956, as the 'high water mark of . . . extraordinary jurisdiction'). Even in the case of charitable trusts, there can be no application of the doctrine of *cy-près*, so long as any possibility of carrying out the settlor's directions remains (*Weir Hospital Case* [1901] 2 Ch. 124). But, where the general intent of the settlor is clear, and the precise means prescribed by him to give effect to it are impossible of execution, the Court may, in the case of charitable trusts, adopt a *cy-près* scheme (*Biscoe v. Jackson* (1887) 35 Ch. D. 460; *Re Davis* [1902] 1 Ch. 876). Where, however, there is a devise or bequest to a specific and then existing charitable institution, which comes to an end before the testator's death, the ordinary rule of lapse applies; and the gift fails (*Re Ovey* (1885) 29 Ch. D. 560; *Re Rymer* [1895] 1 Ch. 19).]

- (b) *Speight v. Gaunt* (1883) L. R. 9 App. Ca. 1.
Learoyd v. Whiteley (1887) L. R. 12 App. Ca. 727.

[The standard of diligence required of a trustee is very difficult to define. One of the best-known attempts is that of Lord Blackburn, in *Speight v. Gaunt*, *ubi sup.*, at p. 19, who describes it as that 'of an ordinary prudent man of business . . . in managing similar

affairs of his own' — a definition substantially adopted by Lord Watson in *Learoyd v. Whiteley*, *ubi sup.*, at p. 733. But, surely, a prudent man of business may, in certain circumstances, justifiably take risks in his own affairs, e. g. leave a debt on personal security, which no trustee, without express authority, would be justified in doing. See remarks of Lindley, L. J., in *Whiteley v. Learoyd* (1886) 33 Ch. D., at p. 355.]

1782. In such administration, the trustee must act upon his own discretion; neither, in the absence of special circumstances, throwing the burden on the Court,^(a) nor delegating it to agents.^(b) *To exercise discretion*

(a) *Perrins v. Bellamy* [1899] 1 Ch., at pp. 801-2, *per* Romer, L. J.

[Where a proper case exists, the trustees may either pay the trust fund into Court under s. 42 of the Trustee Act, 1893, or apply for the directions of the Court under O. LV, r. 3. The latter is the preferable course (*Re Giles* (1886) 34 W. R. 712). But even this must not be resorted to, at the expense of the estate, without good cause (*Perrins v. Bellamy*, *ubi sup.*); and this form of procedure is not suitable for the settlement of questions involving charges of fraud or wilful default (*Dowse v. Gorton* [1891] A. C., at p. 202) or even disputed facts (*Nutter v. Holland* [1894] 3 Ch. 408). Moreover it can only be employed in the cases of trusts arising under a deed or instrument.]

(b) *Learoyd v. Whiteley*, *ubi sup.*, at p. 732.
Davis v. Hutchings [1907] 1 Ch. 356.

[The trustee is, of course, entitled to expert advice in cases of difficulty; but the decision must be his own. He is entitled, where it is practically impossible for him to act in person, to delegate a purely ministerial act to a proper agent (*Speight v. Gaunt*, *ubi sup.*).]

1783. Subject to § 1782, a trustee is not responsible for the default of — *Not responsible in certain cases*

(i) a solicitor whom he has appointed to

receive money or other valuable consideration by permitting him to have the custody of a title-deed containing a receipt effectual under the Conveyancing Act, 1881, s. 56 ;

Trustee Act, 1893, s. 17 (1).

Re Sheppard [1911] 1 Ch. 50.

- (ii) a banker or a solicitor whom he has appointed to receive moneys payable under a policy of insurance, by permitting him to have the custody of the policy with a receipt by the trustee ;

Trustee Act, 1893, s. 17 (2).

unless, in either case, he leaves the money for an unreasonable time in the hands of such solicitor or banker, after he is aware of its receipt by him.

Re Sheppard, ubi sup.

General provision

1784. Subject to the terms of the instrument, if any, creating the trust, a trustee is liable only for money and securities actually received by him ; notwithstanding that he has signed any receipt for the sake of conformity. And he is liable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency

of any securities, nor for any other loss; unless the same happens through his own wilful default.

Trustee Act, 1893, s. 24.

[Despite the apparent width of its terms, it is doubtful whether this provision (which reproduces a similar provision in the Law of Property Amendment Act, 1859 (s. 31)) has really altered the law (*Re Brier* (1882) 26 Ch. D., at p. 238, *per* Lord Selborne, C.). A trustee has never been liable for the default of other persons; except in so far as his own default has contributed to it. But the section may be studied as a useful contribution towards the solution of the difficult question of the standard of diligence required of a trustee.]

1785. It is the duty of a trustee, subject to the terms of the settlement, to get in immediately all outstanding claims of the trust estate, and all such parts of the estate as may not be invested in authorized investments,^(a) and to invest all such parts of the estate as are not already so invested, in authorized investments. For the purposes of this Title, 'authorized investments' means investments authorized by the settlement, or the investments described or referred to in section 1 of the Trustee Act, 1893.^(b) But, when exercising his statutory power of investment, the trustee must observe the conditions specified in sections 2 and 7 of the said Act,^(c) and must act in the exercise of his discretion, and subject to any consent required by the instrument, if any, creating the trust.^(d)

*To realize
outstanding
property*

(a) *McGachen v. Dew* (1851) 15 Beav..84.

[It does not necessarily follow that the trustees must immediately call in all investments made by the settlor himself which they would

not themselves be justified in making (*Re Chapman* [1896] 2 Ch., at p. 782). On the other hand, a direction in the settlement to invest in non-trustee securities does not prevent the trustee investing in trustee securities (*Re Burke* [1908] 2 Ch. 248); unless it is clearly exclusive (*Ovey v. Ovey* [1900] 2 Ch. 524).]

- (b) This enactment sets out a considerable number of permitted investments, and ends by including 'any of the stocks, funds, or securities for the time being authorized for the investment of cash under the control or subject to the order of the High Court.' These securities will be found enumerated in R. S. C., O. XXII, r. 17.
- (c) These conditions forbid the purchase of certain redeemable stock within fifteen years of the date fixed for redemption, at a price higher than its redemption value, or at any earlier date at more than 15 *per cent.* above its redemption value (s. 2). They also forbid the trustees to hold certificates to bearer of certain stocks (s. 7).
- (d) Trustee Act, 1893, s. 3.

[See now Finance Act, 1917, s. 35; and *Head v. Head* (1919) 88 L. J. Ch. 236.]

*Continuing
authorized
securities*

1786. A trustee is not liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or the law.

Trustee Act, 1894, s. 4.

*Investing on
real security*

1787. Subject to the terms of the instrument creating the trust, a trustee who has power to invest in real securities may invest on mortgage, not only of freehold and copyhold, but of property (sc. land) held for an unexpired term of not less than two hundred years, and not subject to a reservation of a rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for

non-payment of rent, and on any charge, or upon any mortgage of any charge, made under the Improvement of Land Act, 1864.^(a) In the absence of express words, a power to invest in real securities does not authorize the trustee to purchase land.^(b)

(a) Trustee Act, 1893, s. 5 (1).

(b) *Re Mordan* [1905] 1 Ch. 515.

[It must be admitted that the judicial authority for the last proposition is hard to discover; but the opinions of text-book writers appear to be uniform; and the proposition seems to be a fair inference from the terms of the section referred to in the first part of the §. In *Re Mordan*, though the special words of the settlement were held to authorize a purchase, the truth of the general rule was not denied.]

1788. A trustee who lends money on any property on which he can lawfully lend, is not chargeable with breach of trust merely on the ground of the insufficiency of the security at the time when the loan was made, if he acted on a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, and on the advice of such surveyor or valuer expressed in the report, and did not lend more than two-thirds of the value of the property as stated in such report.^(a) And if, in such circumstances, he advances more than such proportion on a mortgage security in other respects proper, he is only liable for the loss of the excess.^(b)

*Precautions
in lending
trust money*

(a) Trustee Act, 1893, s. 8 (1).

[The mere fact that the valuer has previously acted for the mortgagor is not necessarily an objection (*Re Solomon* [1912] Ch. 261).]

(b) Trustee Act, 1893, s. 9.

[The two-thirds standard is a minimum, not to be blindly followed (*Shaw v. Cates* [1909] 1 Ch. 389). But there is no absolute rule that only one half should be lent on business premises (*Palmer v. Emerson* [1911] 1 Ch. 758).]

*Dispensing
with full
title*

1789. A trustee is not chargeable with breach of trust merely for dispensing, wholly or partially, with the investigation of the lessor's title in lending on the security of leasehold property; or, in purchasing or lending on any property, for accepting a shorter title than a purchaser under an open contract is entitled to require, if, in the opinion of the Court, the title he accepted was one which a person acting with prudence and caution would have accepted.

Trustee Act, 1893, s. 8 (2) (3).

*Acting under
power of
attorney*

1790. A trustee acting or paying money in good faith under a power of attorney is not liable for any such act or payment by reason of the fact that, unknown to the trustee, the maker of the power of attorney was dead, or had done some act to avoid the power, when the trustee did the act or made the payment.

Trustee Act, 1893, s. 23.

[For the wider protection given by the Conveyancing Acts to persons acting on powers of attorney, see *ante*, Bk. I, Sect. III, Tit. IV, § 141.]

1791. A trustee, under whose trust the income of the trust fund is payable to certain persons and the capital to others, must carefully apportion charges and expenses between income and capital. The following charges or expenses fall, subject to the terms of the settlement, upon income : —

Apportionment of charges between capital and income

- (i) rent of leasehold property held as part of the trust fund ;

Re Betty [1899] 1 Ch. 821.

- (ii) repairs to similar property actually required by the lease to be made,^(a) but not merely voluntary repairs which the trustees are not legally bound to make.^(b)

(a) *Re Giers* [1899] 2 Ch. 54.

Re Sutton (1912) 56 Sol. Jo. 650.

(b) *Re Freman* [1898] 1 Ch. 28.

Re Sutton, ubi sup.

[The tenant for life under a testament is not chargeable with arrears of rent or repairs due at the testator's death ; but only with current charges (*Re Courtier* (1886) 34 Ch. D. 136, followed in *Re Sutton, ubi sup.*).]

- (iii) fire insurance premiums up to three-fourths of the value of insurable property, other than property which the trustee is bound to convey absolutely to any beneficiary on request ;

Trustee Act, 1893, s. 18.

[The position of fire insurance is peculiar. The old rule was, that a trustee was not bound to insure (*Fry v. Fry* (1859) 27 Beav. 144) ; and the section just quoted is merely enabling. Consequently, it would seem that it still rests with the trustees (except in the case of leasehold property where the lease requires it) to refuse to insure (*Re McEacharn* (1911) 103 L. T. 900). If the tenant

for life himself insures, he has no claim against the estate for premiums (*Re Winchilsea's Trusts* (1888) 39 Ch. D. 168). On the other hand, he can take the whole of the insurance money (*Warwick v. Bretnall* (1882) 23 Ch. D. 188); unless the remainderman can claim to have the premises rebuilt under s. 83 of the Fires Prevention Act, 1774 (*Re Quicke's Trusts* [1908] 1 Ch. 887).]

- (iv) rates and local government charges generally, except such as are specifically incurred for the permanent improvement of the property.

Re Crawley (1885) 28 Ch. D. 431.

Re Barney [1894] 3 Ch. 562.

Re Farnham [1904] 2 Ch. 561.

Re Smith [1906] 1 Ch. 799.

But legal costs, charges, and expenses (unless exclusively incurred for the benefit of the persons entitled to the income), are payable out of capital.

Re McClure's Settlement (1906) 76 L. J., Ch. 52.

[Of course, as between the trustees who incur them and the beneficiaries, costs and other outgoings are a charge on both capital and income (*Stott v. Milne* (1884) 25 Ch. D., at p. 715, *per* Selborne, C.).]

*Wasting and
reversionary
securities*

1792. When a testator has bequeathed the residue of his personal estate upon trust to pay the income to a certain person or certain persons for life (? or other limited period) and the capital to certain other persons thereafter, the trustee must, unless the testator has otherwise expressly or by implication directed,^(a) pending the conversion into duly authorized investments (*ante*, § 1785) of any wasting or reversionary securities,^(b) pay to the person or persons en-

titled to the income, not the actual annual produce of such wasting or reversionary securities, but a sum equal to four *per cent. per annum* on the income which would have been produced if the securities in question had been converted into proper investments at the testator's death or the expiry of one year therefrom.^(c) This rule has no application to trusts created by settlement *inter vivos*,^(d) or to devises of realty.^(e)

{ (a) *Collins v. Collins* (1833) 2 My. & K. 703.

[A mere power to postpone realization is not, in itself, a contrary direction (*Re Chaytor* [1905] 1 Ch. 233); unless it appears to have been conferred for the special benefit of the tenant for life (*Re Inman* [1915] 1 Ch. 187). Nor is a gift of the 'rents, issues, and profits' to the tenant for life (*Re Wareham* [1912] 2 Ch. 312).]

(b) It seems to be the better opinion, though the point is not clear, that an actual power to retain wasting securities, excludes the rule—i. e. that the rule only applies to unauthorized wasting securities (See remarks of Kekewich, J., in *Re Bates* [1907] 1 Ch. at pp. 28, 29, and of Warrington, J., in *Re Nicholson* [1909] 2 Ch., at p. 120). But the former case, and *Re Wilson* [1907] 1 Ch. 394, were cases of hazardous, not wasting, securities. If a power is given to retain securities which would otherwise be manifestly improper, it can only be exercised with the concurrence of all the trustees (*Re Hilton* [1909] 2 Ch. 548.)

(c) *Howe v. E. of Dartmouth* (1802) 7 Ves. 137.
Brown v. Gellatly (1867) L. R. 2 Ch. App. 751.
Macdonald v. Irvine (1878) 8 Ch. D. 101.
Re Earl of Chesterfield (1883) 24 Ch. D. 643.
Rowlls v. Bebb [1900] 2 Ch. 107.
Re Beech [1920] 1 Ch. 40.

[Where there is no express direction to convert, the valuation is at a year from the death; where there is, at death or the period (if any) fixed by the testator for realization (*Brown v. Gellatly, ubi sup.*). Sometimes the Court, in carrying out this rule, has allowed 3 (or, now, 4) *per cent.* on the estimated value of the security at the proper period of conversion; at others, the income calculated upon an imaginary investment in Consols at that date.]

(d) *Re Van Straubenzee* [1901] 2 Ch. 779.

(e) *Re Darnley* [1907] 1 Ch. 159.

Re Oliver [1908] 2 Ch. 74.

Unauthor-
ized securi-
ties

1793. (*Semble*) The rule laid down in § 1792 applies to unauthorized as well as to wasting and reversionary securities; ^(a) but an express power to retain indefinitely all or any of the testator's investments, with a direction to pay the income of the entire estate to the tenant for life, prevents the application of the rule to such investments. ^(b)

(a) *Dimes v. Scott* (1827) 4 Russ. 195.

Brown v. Gellatly (1867) L. R. 2 Ch. App., at p. 759.

(b) *Re Bates* (1907) 1 Ch. 22.

Re Wilson, ibid., 394.

[But see *Re Lynch-Blosse* [1899] W. N. 27.]

Liability of
trustee for
improper
investments

1794. In the event of a trustee failing altogether to invest, he will be liable to pay to the beneficiaries interest at the rate of four *per cent. per annum* on the uninvested sum, until it is properly invested. ^(a) If he invests injudiciously in authorized securities, he will be liable for the loss sustained by the beneficiaries. ^(b) If he invests in unauthorized securities, the beneficiaries may (being of full age and capacity) either accept the investment, or reject it and charge the trustee with the money actually invested, and interest at the rate of four *per cent. per annum* from the date of the investment. ^(c)

(a) *Robinson v. Robinson* (1851) 1 De G. M. & G., at p. 255, *per* Cranworth, L. J.

(b) *Re Salmon* (1889) 42 Ch. D. 351.

Re Turner [1897] 1 Ch. 536.

(c) *Re Barclay* [1899] 1 Ch. 674.

[The non-penal rate of interest chargeable against a trustee is now four *per cent.*, not three (*Re Davy* [1908] 1 Ch. 61). If the beneficiaries reject the investment, they have no claim under the rule set out in § 1792 (*Slade v. Chaine* [1908] 1 Ch. 522). If they accept an unauthorized investment, it would seem that, on principle, they could not claim in respect of ultimate loss. But they have been allowed to prove such a claim in the bankruptcy of the trustee (*Re Lake* [1903] 1 K. B. 439).]

1795. A trustee must be prepared to render, at *Trustee's accounts* all reasonable times, full accounts of his dealings with the trust property, and to give full information as to the condition of the trust, to all persons interested under the trust; ^(a) and he will be charged personally with the costs of any proceedings which may be rendered necessary to compel the production of such accounts or information. ^(b)

(a) Even persons only contingently interested are entitled to information (*Re Skinner* [1904] 1 Ch. 289).

(b) *Pearse v. Green* (1819) 1 J. & W. 140, *per* Lord Eldon, C.
Re Tillott [1892] 1 Ch. 86.

[Any trustee or beneficiary may now insist on having the accounts of the trust audited not oftener than once a year by a solicitor or accountant agreed between the parties or appointed by the Public Trustee (Public Trustee Act, 1906, s. 13; *Re Oddy* [1911] 1 Ch. 532; *Re Utley* (1912) 56 Sol. Jo. 518). The accounts of a judicial trustee (*ante*, Tit. II, § 1780) are audited once a year (Judicial Trustees Act, 1896, s. 1 (6)).]

1796. A trustee must not make any personal profit *No profit by trustee* out of the trust; except so far as he is expressly authorized to do so by the settlement.

Keech v. Sandford (1726) Sel. Ca. in Ch. 61.
Re Sykes [1909] 2 Ch. 241.

In particular, he must not:—

- (i) renew for his own benefit a lease belonging to the trust;

Keech v. Sandford, ubi sup.

[A trustee is now bound, on request of any beneficiary interested, and in his own discretion if no such request is made, entitled, to use his best endeavours to renew a lease of renewable leaseholds for the benefit of the trust; unless there is a person in possession entitled to enjoy the leaseholds without liability to renew or contribute to the cost of renewal, and his written consent cannot be obtained (Trustee Act, 1893, s. 19 (1)).]

- (ii) speculate or deal with the trust property with a view to personal gain;

Rochefoucauld v. Boustead [1898] 1 Ch. 551.

Re Davis [1902] 2 Ch., at p. 317.

[And if he does, the beneficiaries may claim either all the profit, or the return of the money employed with interest at the penal rate of five *per cent.* The severity of the rule is best realized from the fact that, in *Rochefoucauld v. Boustead, ubi sup.*, the trustee was charged with a sum borrowed by him on the security of the trust property; notwithstanding that no resort was made to the property by the lender.]

- (iii) charge commission or profit costs for professional or other services;

Matthieson v. Clarke (1854) 3 Drew. 3.

Re Chalinder and Herington [1907] 1 Ch. 58.

[The disability extends to costs paid by third parties, which must be received and carried to the credit of the trust fund (*Re Corsellis* (1887) 34 Ch. D. 675); and the ordinary authority in a settlement only covers strictly professional charges (*Re Chalinder and Herington, ubi sup.*). But the disability does not extend to the trustee's partner; and, if the partnership articles *bonâ fide* provide that all profit costs shall in such cases go to the partners, the firm may receive them (*Clack v. Carlon* (1861) 30 L. J. Ch. 639; *Re Doody* [1893] 1 Ch. 129). Moreover, a solicitor who acts for himself and co-trustee in litigation, the costs not being thereby increased, is entitled

to profit costs (*Cradock v. Piper* (1850) 1 Mac. & G. 664). A rule which used to forbid the charging of profit costs by solicitor-mortgagees has now been abolished by the Mortgagees' Legal Costs Act, 1895.]

- (iv) purchase the trust property from himself without the leave of the Court.

Fox v. Mackreth (1788) 2 Bro. C. C. 400 ; 4 Bro. P. C. 258.

Farmer v. Dean (1863) 32 Beav. 627.

Williams v. Scott [1900] A. C., at p. 503.

[There is no absolute rule against a trustee purchasing the interest of a beneficiary. But the transaction leaves upon the trustee the *onus* of proving its fairness (*Ex parte Lacey* (1802) 6 Ves. 625); though, if the beneficiaries reclaim the property, they are not entitled to interest on the rents or profits (*Silkstone Co. v. Edey* [1900] 1 Ch. 167). A former trustee, who has *bonâ fide* retired from the trust, may purchase the trust property (*Boles and British Land Co.* [1902] 1 Ch. 244). It is sometimes said that the rule in the sub-s. does not apply to 'bare trustees' — i. e. trustees with no active duties to perform.]

Any profit which may accrue from the dealings of the trustee with the trust fund accrues to the fund.

Keech v. Sandford, ubi sup.

[The rule that a trustee must not make any unauthorized personal profit out of his position has been extended to persons who are not strictly trustees, e. g. tenants for life (*Griffith v. Owen* [1907] 1 Ch. 195), partners (*Bevan v. Webb* [1905] 1 Ch. 620), and agents (*Andrew v. Ramsay* [1903] 2 K. B. 635). But the rule must not be pushed so as to include remote profits (*Re Lewis* (1910) 103 L. T. 495), or remote relationships (*Re Biss* [1903] 2 Ch. 40). The Public Trustee is, and a judicial trustee may be, entitled to remuneration for his services (Public Trustee Act, 1906, s. 8 (1); Judicial Trustees Act, 1896, s. 1 (5)).]

TITLE IV — POWERS OF TRUSTEES

[*NOTE* — The powers described in this Title are independent of, and in addition to, any statutory overriding powers which trustees may exercise in virtue of the provisions described in Section VI, Title II, and Section VII, Title I, § 1504, *ante*.]

*Disposition
of trust
property*

1797. Apart from express provision in the settlement, and subject to Tit. III, §§ 1785, 1792, *ante*, a trustee has, as such, no power to sell,^(a) lease,^(b) or mortgage^(c) the trust property; except that: —

- (i) where there is a devise of a testator's whole interest in real estate to trustees, charged with the payment of debts or legacies, or other specific sum or sums, the trustees may, in the absence of express provision for raising such sum or sums, sell or mortgage the land for the purpose of raising such sum or sums; ^(d)
- (ii) where a settlement of property as personal estate contains a power to invest money in purchase of land, such land will, unless the settlement otherwise provides, be held by the trustees on trust for sale, with power to postpone the sale; ^(e)
- (iii) where any property vested in trustees by way of security becomes irredeemable, they hold it on trust for sale, with power to postpone sale; ^(ee)

- (iv) (*semble*) trustees may let land on a yearly tenancy, or for a short period, if such a step is necessary or desirable in the interests of the trust; ^(f)
- (v) where a trustee properly exercises his duty or power to obtain a renewal of renewable leaseholds (*ante*, Tit. III, § 1796 (i) n.), he may, if he has not in his hands sufficient money for the purpose, raise the money required to effect such renewal, by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the same user or trusts. ^(g)

(a) *Perrins v. Bellamy* [1899] 1 Ch. 797.

(b) *Bowes v. E. London Waterworks* (1818) 3 Madd. 375; *affd.* Jac. 324.

(c) *Walker v. Southall* (1887) 56 L. T. 882.

Sheffield &c. Bdg. Soc. v. Aizlewood (1889) 44 Ch. D. 412.

(d) Law of Property Amendment Act, 1859, ss. 14, 15.

[This power has now become almost obsolete; owing to the change in the law made by s. 1 of the Land Transfer Act, 1897, under which the personal representatives of the testator can sell to pay debts and legacies. But it may still be useful in the case of deaths between 1859 and 1898.]

(e) Conveyancing Act, 1911, s. 10; (ee) *ibid.* s. 9.

(f) *Naylor v. Arnitt* (1830) 1 Russ. & M. 501.

(g) Trustee Act, 1893, s. 19 (2).

[It cannot be doubted that, if the trustee is legal owner, a *bonâ fide* purchaser from him would get an unimpeachable title (*Bowes v. London E. W. Works*, *ubi sup.*, in Jac., at p. 330, *per* Lord Eldon, C., and see *ante*, Sect. I, Tit. XI, § 1313). And it must be admitted, that there is little express authority for the rule in the text as regards pure personalty. But the general principle stated in the text seems to be accepted as law.]

Mode of sale

1798. Where a trustee has a trust for or power of sale, he may (subject to the provisions of the settlement) sell or concur in selling any part of the property, whether subject to prior charges or not, either together or in lots, by public auction or private contract, subject to any conditions respecting title or evidence of title, or other matter, as he thinks fit, with power to vary any contract for sale and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss. This § only applies to trusts or powers created by settlements coming into operation after 1881.

Trustee Act, 1893, s. 13.

*Depreciatory
conditions*

1799. No sale made by a trustee can be impeached by a purchaser, in any case, on the ground that the conditions of sale were unnecessarily depreciatory; nor by a beneficiary, unless it appears that the alleged depreciatory character rendered the consideration for the sale inadequate. And no such sale can be impeached on such ground against the purchaser, after the execution of the conveyance; unless it is shown that he was acting in collusion with the trustee when the contract for sale was made.

Ibid., s. 14.

Minerals

1800. A trustee having for the time being a power to dispose of land, may, with the sanction of the Court, dispose of the land with an exception

or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so dispose of the minerals, with or without the said rights or powers, separately from the residue of the land.

Trustee Act, 1893, s. 44 (1).

[The sanction, once given, operates to authorize future dispositions of 'such' land or minerals (? all the other land or minerals comprised in the settlement). But this further authority is subject to the terms of the settlement (*ibid.*, s. 44 (2)).]

1801. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section 2 of the Vendor and Purchaser Act, 1874 ;^(a) and a trustee, whether acting by himself or through a solicitor, will not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any instrument, or in connection with any contract for sale or other transaction, to negative the giving, inclusion, implication, or application, of any of the powers, covenants, provisions, stipulations, or words, given, or deemed to be included or implied in any such instrument, or made applicable to any such transaction, by the Conveyancing Act, 1881.^(b)

*Vendor and
purchaser
and Convey-
ancing Acts*

(a) *Ibid.*, s. 15.

(b) Conveyancing Act, 1881, s. 66.

[For the wider immunities of a trustee purchasing or lending on property generally, see *ante*, Tit. III, §§ 1787-1790. The provisions of the Vendor and Purchaser Act, s. 2, are too long to set out. They comprise various conveyancing rules for the completion of an

open contract for the sale of land. The provisions of the Conveyancing Act, 1881, to which reference is made, are also very numerous, and can only be appreciated by a perusal of the Act.]

Infant's land

1802. Where a person beneficially entitled to the possession of land is a minor, the trustees described in Sect. VII, Tit. I, § 1505, *ante*, have power to manage the land and do such acts as are specified in that §.

Conveyancing Act, 1881, s. 42.

Conveyancing Act, 1911, s. 14.

Repairs

1803. Subject to § 1802, and to any directions in the settlement, a trustee has no power to lay out money at the expense of the beneficiaries in effecting repairs not necessary for the preservation of the property from forfeiture or destruction. Where repairs are necessary, the trustees must apply to the Court to apportion the cost of the repairs amongst the beneficial interests.

Re De Teissier [1893] 1 Ch. 153.

Re Willis [1902] 1 Ch. 15.

Re Legh [1902] 2 Ch. 274.

Re Garnham [1904] 2 Ch. 561.

[On the other hand, North, J., in the case of *Re Freman* [1898] 1 Ch. 28, seems to have assumed that the trustees had power, at any rate with the approval of the Court, to do repairs described as 'necessary' (generally). And, in the still earlier case of *Re Hotchkys* (1886) 32 Ch. D. 408, Lindley, L. J. (at p. 420) suggested that, if it was 'judicious' to make repairs, the Court would authorize them. But these views are somewhat at variance with the expressions of the Court in the later cases. It has been previously pointed out (Tit. III, § 1791 (ii)) that the cost of repairs which the owner

of the property is legally liable to perform (e. g. those required by the covenants of a lease under which the property is held) fall upon income.]

1804. A trustee may, subject to the terms of the settlement, insure any insurable property against loss or damage by fire to an amount (including any insurance already on foot) not exceeding three-fourths of its full value, and pay the premiums thereof out of the income of such property or of any other property subject to the same trusts, without obtaining the consent of the person or persons entitled to such income. This power does not apply to property which the trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

Insurance

Trustee Act, 1893, s. 18.

[The position of a trustee in respect of *liability* to insure against fire has been previously noted (see *ante*, Tit. III, § 1791 (iii)).]

1805. Subject to the express provisions of the settlement, a trustee may appoint a solicitor as his agent to receive money or other valuable consideration under the trust, by permitting him to have the custody of, and produce, a deed containing a receipt which would, under the provisions of section 56 of the Conveyancing Act, 1881, justify the person paying or transferring such money or valuable consideration, in handing it over to the solicitor of an ordinary

*Appointment
of agents to
receive money*

vendor ; and such person will be justified in handing it to such solicitor. And a trustee may appoint a banker or a solicitor to receive and give a discharge for money payable to the trustee under a policy of assurance, by permitting him to have the custody of the policy with a receipt signed by the trustee.

Trustee Act, 1893, s. 17.

[Apparently, this section abolishes the rule laid down by the Court of Appeal in *Bellamy v. Metropolitan Board of Works* (1883) 24 Ch. D. 387, and renders it unnecessary for the trustees, in the event of loss of the purchase money through the default of the solicitor, to prove special reasons for their action in allowing him to receive it.]

Receipts

1806. A trustee has power to give an effectual receipt in writing for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power ; and such receipt will exonerate the person paying, transferring, or delivering the same (to him as trustee) from seeing to the application, or being answerable for any loss or misapplication, thereof.

Ibid., s. 20.

[Though the words in brackets are not in the Act, it has been held that the corresponding section (36) of the Conveyancing Act, 1881, does not protect a person who pays trust money to a trustee, not knowing him to be such (*Miller v. Douglas* (1886) 56 L. J. Ch. 91 — which was, however, a case of trustees who were also executors). Unlike a single executor, one of co-trustees cannot give a good discharge without the concurrence of his co-trustees (*Flower and Metropolitan Board of Works* (1884) 27 Ch. D. 592).]

1807. Subject to the terms of the instrument (if *Acceptance of composition* any) creating the trust, two or more trustees acting together (or a sole acting trustee where, by the instrument creating the trust, a sole trustee is authorized to execute the trusts and powers thereof) may, if and as he or they may think fit, accept any composition or any security for any debt or any property claimed, and may allow time for payment of any debt, account, claim, or thing whatever relating to the trust, and for these purposes may execute such instruments and do such things as to them or him seem expedient, without being responsible for any loss occasioned by any act or thing so done in good faith.

Trustee Act, 1893, s. 21.

[This section has been, apparently, held to sanction even a compromise with defaulting trustees by their successors (*Re Sewell* [1909] 1 Ch. 806). But in doubtful cases the trustees ought to take the opinion of the Court (*Re Houghton* [1904] 1 Ch. 622).]

1808. Where trustees are in the possession of the *Income of infant's land* land of a minor under the powers described in Sect. VII, Tit. I., § 1505, *ante*, they may, subject to the terms of the instrument under which the interest of the minor arises, apply at discretion any income arising from such land (including accumulations) for the minor's maintenance, education, or benefit, or pay thereout any money to his parent or guardian, to be applied for the same purposes. But this power

only exists where the instrument under which the minor's interest arises came into operation after 1881.

Conveyancing Act, 1881, s. 42 (4) (7) (8).
Conveyancing Act, 1911, s. 14.

[The surplus income is to be invested and (subject to the power of resort) accumulated for the benefit of the minor on his attaining twenty-one, or, if the minor is a woman and marries during minority, for her separate use on marriage (her receipt being a good discharge), or, if the minor dies during minority and (being a woman) unmarried, to be held upon the trusts of the settlement, or (where the minor has taken by inheritance or is entitled to the fee simple) for the benefit of his personal representatives (Act of 1881, s. 42 (5)).]

*Advancement
of infant's
income*

1809. Subject to the terms of the instrument under which the interest of the minor arises, when trustees hold any property in trust for a minor, either for life or any greater interest, and whether absolutely or contingently on his attaining-twenty-one^(a) or on the occurrence of any previous event, the trustees may, at their sole discretion, pay to the minor's parent or guardian, or otherwise apply for or towards the minor's maintenance, education, or benefit,^(b) the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the minor's maintenance or education, or not.^(c)

- (a) If the intervening income would not in any case belong to the minor, even though the contingency occurred (e. g. where there is a condition precedent to the vesting of an estate) the trustees cannot, as

a general rule, apply it under this power (*Re Dickson* (1883) 29 Ch. D. 331). But the Court may order maintenance, even out of such income, in the following cases of testamentary trusts—(a) where the testator stood *in loco parentis* towards the minor, and the contingency is the attainment of the latter's majority (*Re Abrahams* [1911] 1 Ch. 108), and no maintenance is provided by the testament for the minor (*Green v. Belchier* (1737) 1 Atk., at p. 507, *per* Lord Hardwicke, C.; *Re George* (1877) 5 Ch. D., at p. 843, *per* James, L. J.); (b) where the trust fund is a specific or merely deferred legacy, or, being a contingent legacy, is set apart from the testator's general estate by the testament (*Re Jeffery's Trusts* (1866) L. R. 2 Eq. 68; *Re Clements* [1894] 1 Ch. 665)—in the case of a *contingent* legacy, it is not enough that it should be merely specific (*Guthrie v. Walrond* (1883) 22 Ch. D. 573); (c) where the trust fund is residuary personality (*Re Adams* [1893] 1 Ch. 329); (d) where there is a direction to accumulate, followed by a gift of the accumulations for the benefit of the minor, whether for life or absolutely (*Re Collins* (1886) 32 Ch. D. 229; *Re Walker* [1901] 1 Ch. 879); (e) where there is a power to advance out of the capital of the fund (*Re Churchill* [1909] 2 Ch. 431). And it is possible that the trustees under s. 43 have power to do what the Court might do. In cases (b) and (c), the infant is, probably, entitled to the whole of the intervening income, as such, if he fulfils the contingency; in the other cases, there is, probably, merely a discretion to make an advancement for his benefit (*Re Bowlby* [1904] 2 Ch., at pp. 706–708, *per* Romer, L. J.).

- (b) This power may be exercised, in the case of personality, even after one member of a class entitled on majority attains majority (*Re Holford* [1894] 3 Ch. 30). But (*semble*) the old rule that, in the case of real estate, the member first attaining a vested interest is entitled to the whole income, is still unaffected (*Re Averill* [1898] 1 Ch. 523).

- (c) Conveyancing Act, 1881, s. 43 (1).

[The residue of the income is to be accumulated and invested by the trustees (but with power to resort to accumulations) for the benefit of the person who ultimately becomes entitled to the property from which the same arises,' (*ibid.* (2)). After much conflict of opinion, it has now been decided, that the accumulations become part of the corpus of the property, and are subject to the trusts affecting the corpus—i. e. if the minor is only a tenant for life, he only gets the interest on them (*Re Bowlby* [1904] 2 Ch. 685). Presumably, the direction to accumulate only applies where the infant will be entitled, on fulfilling the contingency, to the intervening income in some form. But it has been held, that the fact that the

minor only takes a life interest in the accumulations (*Re Bowlby, ubi sup.*) does not prevent the trustees making him an allowance during minority (*Re Boulter* [1918] 2 Ch. 40).]

*Survival of
powers*

1810. Where, under a settlement coming into operation after 1881, a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being; ^(a) and, until the appointment of new trustees under such a settlement, the personal representatives or representative for the time being of a sole trustee, or of a last surviving or continuing trustee, may (subject to the terms of the settlement) exercise any power given to, or capable of being exercised by, the sole or last surviving or continuing trustee. ^(b)

(a) Trustee Act, 1893, s. 22.

[It will be observed that the section makes no provision for merely 'continuing' trustees, e. g. where one trustee has retired under the provisions of s. 11 of the Trustee Act, 1893.]

(b) Conveyancing Act, 1911, s. 8.

[Apparently, the rule about survivorship only applies where the powers are conferred on the trustees as such (*Crawford v. Forshaw* [1891] 2 Ch. 261 — where, however, the corresponding section (38) of the Conveyancing Act, 1881, was not referred to). But the tendency of the Courts is against construing powers as personal (*Re Smith* [1904] 1 Ch. 139). Presumably, the rule in s. 22 of the Trustee Act applies to statutory as well as to express powers. As to the effect of disclaimer of powers, see *ante*, Sect. VI, Tit. I, § 1468 (i). But, presumably, a person appointed trustee could hardly disclaim a power given him as such, without disclaiming the trust.]

1811. Every trustee appointed under Title II, §§ 1776 (ii) (iii) (iv), and 1777, *ante*, has, as well before as after the trust property becomes vested in him (*post*) Tit. VII, §§ 1829, 1831), the same powers, authorities, and discretions, and may in all respects act, as if he had originally been appointed a trustee by the instrument, if any, creating the trust. *Powers of new trustees*

Trustee Act, 1893, ss. 10 (3), 37.

[Presumably s. 37 of the Trustee Act, 1893, would apply to a judicial trustee; in spite of the fact that it was passed before judicial trustees were created. There is no general provision as to the powers of judicial trustees in the Judicial Trustees Act, 1896. But the Court may give a judicial trustee any general or special directions in regard to the trust or the administration thereof (*ibid.*, s. 1 (4)).]

TITLE V—RIGHTS OF TRUSTEES

*Indemnity out
of trust prop-
erty*

1812. Trustees are entitled to be indemnified out of the trust property for all expenses and liabilities properly incurred by them in or about the execution of the trust; and such indemnity will be a first charge on the trust property.

Trustee Act, 1893, s. 24.

Re Turner [1907] 2 Ch. 126.

[The most striking illustration of this rule is to be found in the fact that costs have been allowed out of the property to trustees of a settlement which was set aside as fraudulent under the 13 Eliz. c. 5; they being personally innocent (*Ideal Bedding Co. v. Holland* [1907] 2 Ch. 157).]

*Personal
claim on
beneficiaries*

1813. As against beneficiaries of full age and capacity, the trustees^(a) have also a personal claim to indemnity in respect of such expenses and liabilities; ^(b) and such claim will not be extinguished by the fact that the beneficiaries have parted with their interests, if the expenses and liabilities were incurred whilst the beneficiaries held their interests.^(c) But such claim may be excluded, either by express provision of the settlement, or by implication from the circumstances.^(d)

(a) The right of a trustee passes to his trustee in bankruptcy (*St. Thomas' Hospital v. Richardson* [1910] 1 K. B. 271).

(b) *Hardoon v. Belilios* [1901] A. C. 118.

(c) *Matthews v. Ruggles-Brise* [1911] 1 Ch. 194.

(d) *Wise v. Perpetual Trustee Co.* [1903] A. C. 139.

[It does not seem quite clear whether the liability of the beneficiaries is put on the ground of implied request or on the ground that the trustees were compelled to incur the expenses. The former appears to be the most satisfactory basis.]

1814. A trustee who has reasonably allowed the management of the trust property to remain in the hands of a co-trustee, on account of the latter's special knowledge and skill, or other circumstances, may be given, in the discretion of the Court, an indemnity from such co-trustee in respect of any liability for breach of trust incurred through the default of such co-trustee. *Indemnity against co-trustee*

Bakin v. Hughes (1886) 31 Ch. D. 390.

Re Linsley [1904] 2 Ch. 785.

[Of course the innocent trustee is liable to the beneficiaries (see *post*, Tit. VI, § 1822. That is, indeed, the basis of his claim to indemnity.)

1815. A trustee who has been called upon to make good a breach of trust not occasioned solely by his own fault, and not amounting to actual fraud, will be entitled to contribution from his co-trustees. *Contribution from co-trustees*

Robinson v. Harkin [1896] 2 Ch. 415.

Jackson v. Dickinson [1903] 1 Ch. 947.

1816. Where a beneficiary has instigated, or consented in writing to, a breach of trust, his beneficial interest may, in the discretion of the Court, be impounded to recoup the trustee for any liability *Impounding of beneficiary's interest*

incurred by him through such breach ; even where the beneficiary is a married woman restrained from anticipation (see *ante*, Bk. I, Sect. III, Tit. II, §§ 105-108).

Trustee Act, 1893, s. 45.

Griffiths v. Hughes [1892] 3 Ch. 105.

Re Somerset [1894] 1 Ch. 231.

TITLE VI—REMEDIES FOR BREACH OF TRUST

1817. A beneficiary may claim the trust property, *Against the trust property* in whose hands soever it may be ; except that he cannot claim it against a *bonâ fide* purchaser for value, who has acquired the legal ownership (or the best right to call for it) without notice of the trust, or against persons (other than the trustee himself) taken through such purchaser.

Hunter v. Walters (1871) 41 L. J. Ch. 175 ('best right to call').

Pilcher v. Rawlins (1872) L. R. 7 Ch. App. 260.

Taylor v. Russell [1892] A. C. 244.

Wilkes v. Spooner [1911] 2 K. B. 473.

[The exception from the general rule stated in the § is merely the result of the application of the maxim : 'where the equities are equal, the law must prevail.' Its scope has been carefully explained in earlier parts of the work (see Sect. I, Tit. XI, §§ 1313-1321, and Sect. IX, Tit. II, § 1548). The general rule in the § is the best illustration of the important principle, that the interest of the beneficiary under a trust is not merely a chose in action, but actual property, protected against all except a limited class of persons.]

1818. Subject to the exception specified in § 1817, *Against the proceeds* a beneficiary may also claim the proceeds of trust property, improperly converted by the trustee in breach of trust, so long as he can identify them. And if the proceeds remain in the hands or under the control of the trustee, the beneficiary will be

preferred to the general creditors of the trustee, even in the latter's bankruptcy.

Taylor v. Plumer (1815) 3 M. & S. 562.

Hopper v. Conyers (1866) L. R. 2 Eq. 549.

Re Hallett (1879) 13 Ch. D. 696.

Re Oatway [1903] 2 Ch. 356.

[This rule, which is one of the most striking features of the law of trusts, and, in some ways, makes a beneficiary's interest stronger than some legal claims, is not confined strictly to trusts, but is applied to all cases of fiduciary ownership, e. g. broker and client's money (*Hancock v. Smith* (1889) 41 Ch. D. 456), solicitor and clients' funds (*Re Stenning* [1895] 2 Ch. 433). Very slight marks of identification have been treated as sufficient; and probably *Coleman v. Bucks, &c. Bank* [1897] 2 Ch. 243, was wrongly decided. To a certain extent, as the cases show, the rule even supersedes the doctrine that money has no ear-mark, or, as it is more correctly put, that current coin of the realm cannot be recovered after it has passed in currency (*Miller v. Race* (1758) 1 Burr., at p. 459, *per* Lord Mansfield, C. J.). The method of enforcing the rule is, to declare the legal owner of the proceeds a trustee for the beneficiary, with (if necessary) a consequential vesting order under § 1831, *post.*]

*Tracing
proceeds*

1819. In tracing the identity of the proceeds of an improper conversion of trust property, a trustee who has paid such proceeds into a blended fund, containing also moneys of his own, will be deemed, in every case, regardless of the dates of the payment in of the trust funds and his own, to have drawn against his own money, so long as any remains in the fund.^(a) But as between rival beneficiaries under different trusts, the proceeds of whose trust property have been paid into a blended fund, the trustee will be deemed (in the absence of proof to the contrary) to have drawn against such trust proceeds in the order in which they were paid in.^(b)

- (a) *Re Hallett, ubi sup.*
Hancock v. Smith, ubi sup.
Re Oatway, ubi sup.

[If the remaining fund exceeds the amount of the beneficiary's claim, he gets a charge upon it; if not, he takes the whole (*Re Hallett, ubi sup.*, at p. 709). If the whole fund is exhausted by the trustee's drawings, the beneficiary will have no claim upon moneys subsequently paid in (*semble*, unless the trustee specially appropriates them to the trust) (*James Roscoe v. Winder* [1915] 1 Ch. 62).]

- (b) *Clayton's Case* (1816) 1 Mer. 585.
Re Stenning [1895] 2 Ch. 433.

[The Rule in *Clayton's Case*, which applies generally to rival claimants on a mixed fund, is merely a presumption of fact, not a rule of law (*Deeley v. Lloyds' Bank* [1912] A. C., at p. 771, *per* Lord Atkinson); and a fraudulent trustee can, if he pleases, favour one or more trust funds at the expense of others, if his intention is clear.]

1820. A beneficiary can claim to have any beneficial interest which the trustee may himself have (whether original or acquired) in the same trust fund, impounded to satisfy a breach of trust by the trustee; and such claim will prevail even against a *bonâ fide* purchaser of the trustee's beneficial interest (not being a purchaser for value of a legal interest without notice of the trust) who paid his money before the breach of trust was committed.

Against the trustee's beneficial interest

- Priddy v. Rose* (1817) 3 Mer. 86.
Barnett v. Sheffield (1852) 1 De G. M. & G. 371.
Cole v. Muddle (1852) 10 Hare, 186.
Doering v. Doering (1889) 42 Ch. D. 203.

[The principle is: that the trustee is deemed to have paid himself (*Doering v. Doering, ubi sup.*). But the rule only applies where the trustee's beneficial interest is really part of the trust fund, not where it merely arises under the same instrument which contained the settlement (*Fox v. Buckley* (1876) 3 Ch. D. 508; *Re Towndrow* [1911] 1 Ch. 662); and only where the purchaser was not entitled to believe that the trust was at an end (*Pearce v. Bulteel* [1916] 2 Ch. 544).]

*Against the
trustee per-
sonally*

1821. Subject to §§ 1823 and 1826, *post*, the Court will order a trustee (including a constructive trustee^(a)) to pay personally to the trust fund any loss occasioned by any breach of trust committed by him; and such order may be enforced as a judgment debt by execution against the trustee's own property,^(b) and, if the loss is the loss of money which has been in the trustee's possession or under his control, at the discretion of the Court, by an order for attachment of the trustee's body.^(c)

(a) *Smith v. Patrick* [1901] A. C. 282.

(b) R. S. C., O. XLII, s. 54.

[As to the enforcement of judgments by execution, see *ante*, Sect. V, § 1457 n., and Sect. XI, § 1607. If a trustee is ordered to deliver up papers, and does not comply, a writ of assistance may be issued against him (*Re Taylor* [1913] W. N. 212).]

(c) Debtors Act, 1869, s. 4 (3).

Debtors Act, 1878, s. 1.

Middleton v. Chichester (1871) L. R. 6 Eq. 152.

[Before a writ of attachment can be obtained, however, certain formalities must be carefully observed (*Re Oddy* [1906] 1 Ch. 93), including the rather difficult task of serving upon the trustee, with the notice of motion, a copy of affidavit of service thereof (O. LII, r. 4). And the money lost must actually have been under the trustee's control. A mere constructive receipt through an agent, for whom the trustee is responsible, is not enough (*Re Fewster* [1901] 1 Ch. 447). And the Court will not accept even a formal admission of the trustee as conclusive against him (*Harper v. McIntyre* (1908) 99 L. T. 191).]

*Liability of
co-trustees*

1822. The personal liability of co-trustees is joint and several; and acceptance of a composition from one or more of such trustees does not prevent the

beneficiary proceeding against the other or others for the full amount of the loss, until the whole has been made good.

Edwards v. Hood-Barrs [1905] 1 Ch. 20.

[The right of trustees to contribution from their co-trustees has been already explained (see *ante*, Tit. V, § 1815).]

1823. An express trustee, in answer to a claim for breach of trust, may not plead the statutes of limitation in any case where the claim is founded on any fraud or fraudulent breach of trust to which he was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by him and converted to his own use. In other cases, a trustee may plead the statutes of limitation applicable. Where no statute of limitation in force on 24th December, 1888, applies, the claim will be treated (even as against a married woman restrained from anticipation) as a claim of debt for money had and received; but time will only begin to run against a beneficiary from the date when his interest became an interest in possession.

*Statutes of
limitation*

Trustee Act, 1888, s. 8 (1).

[Originally, the Court of Chancery never allowed an express trustee to set up the statutes of limitation; and it even claimed to disregard them in suits to recover equitable property from strangers. This last claim was, however, rendered untenable as to land by the Real Property Limitation Act, 1833, s. 24; and there is no statute of limitations (other than that embodied in the §) applicable to the recovery of pure personalty. But the rule as against the express

trustee himself was expressly preserved by the Judicature Act, 1873, s. 25 (2), and remained in force till the passing of the Trustee Act of 1888, which provides (s. 8 (2)) that the claim of one beneficiary shall not be kept alive by a judgment or order obtained by another. For the purposes of the rule, an 'express' trustee includes all persons with whom property has been deposited on the strength of a fiduciary relation (*Sear v. Ashwell* [1893] 2 Q. B., at p. 397, *per* Bowen, L. J.).]

*Effect of
trustee's
bankruptcy*

1824. A personal claim against a trustee founded on fraudulent breach of trust, is not extinguished by the discharge of the trustee in bankruptcy proceedings; ^(a) but it is extinguished by a voluntary acceptance, duly made by the beneficiary or on his behalf, of a composition. ^(b)

(a) Bankruptcy Act, 1883, s. 30 (1).

(b) *Re Sewell* [1909] 1 Ch. 806.

*Relief
against
breach of
trust*

1825. A trustee who is or may be personally liable for a breach of trust may be relieved, wholly or partially, from such personal liability by the Court, if it appears to the Court that he has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the direction of the Court in the matter in which he committed such breach.

Judicial Trustees Act, 1896, s. 3.

Perrins v. Bellamy [1899] 1 Ch. 797.

Re Mackay [1911] 1 Ch. 300.

Re Allsop [1914] 1 Ch. 1.

[The Court has felt a difficulty in interpreting this enactment, inasmuch as a trustee who has acted 'reasonably and honestly' is

not, *primâ facie*, personally liable at all (*Re Mackay, ubi sup.*). But the view taken is, that the section was intended to cover cases in which, though guilty of a technical breach of trust in view of the high standard of diligence demanded of a trustee, the trustee has acted as an ordinarily prudent business man would act, e. g. in following the advice of experts believed to be capable. In fact a trustee has been excused under it who had actually paid trust funds to the wrong person (*Re Allsop, ubi sup.*).]

1826. A beneficiary cannot enforce any claim against a trust fund until all obligations due from him under the settlement have been discharged. *Beneficiary must discharge liabilities to trust*

Priddy v. Rose (1817) 3 Mer., at p. 104, *per* Grant, M. R.
Re Weston [1900] 2 Ch. 165.

1827. A beneficiary may pursue all his remedies at once, or in any order he pleases, and continue to do so until he has recovered all that he has lost by the breach of trust. *Concurrent remedies of beneficiary*

Frances v. Frances (1854) 3 De G. M. & G. 108.

[The amount of judicial and literary authority for this important proposition is astonishingly small; but its truth can hardly be doubted. Nevertheless, it may give rise to difficult questions, and even some hardship, in practice, e. g. where a purchaser from a trustee is technically affected with notice of the trust, though without personal default, and the beneficiary refuses to proceed against the trustee personally.]

TITLE VII—TRANSFER OF THE TRUST ESTATE

*Conveyance
of trustee's
interest*

1828. The interest of the trustee will pass by any conveyance or event by which a similar interest belonging to the trustee beneficially, would pass; but it will (subject to Tit. VI, § 1817, *ante*) remain subject to the claims of the beneficiaries.

[This is elementary law; for which it is hard to find any direct authority. Trustees are invariably made joint owners; and therefore, on the death of one of them, his interest passes to the survivor or survivors (*ante*, Sect. XVI, Tit. II, § 1753). In case of the death of a sole trustee, since the coming into operation of the Conveyancing Act, 1881 (s. 30), his interest (even though it consists of freehold real estate of inheritance) passes on his death to his personal representatives; and this is now in accordance with the general law (Land Transfer Act, 1897, s. 1). But if the interest is a legal copyhold estate, it still passes to his customary heir or devisee (Copyhold Act, 1894, s. 88).]

Vesting declaration

1829. Where a new trustee has been appointed under Tit. II, § 1776, 1777, *ante*, or where a retiring trustee is discharged under § 1778, of that Title, if the deed of appointment or discharge contains a vesting declaration, the trust property passes accordingly to the persons who by such deed become and are the trustees for performing the trust, or the continuing trustees, as the case may be, as joint owners, for the purposes of the trust, without any conveyance or

assignment; except that this § does not apply to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, or annuity, or property, as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

Trustee Act, 1893, s. 12 (1) (2) (3).

[In the case of a retiring trustee, the deed must be executed by the retiring and continuing trustee, and by such other person (if any) as is empowered to appoint trustees (*ibid.* (2)).]

1830. There can be no involuntary alienation of the interest of a trustee; ^(a) except by his death, ^(b) or by his removal by the Court under § 25 of the Trustee Act, 1893 (*ante*, Tit. II, § 1776 (iv)), followed, if necessary, by a vesting order (*post*, § 1831). *No liability for trustee's debts*

(a) Bankruptcy Act, 1914, s. 38 (1) (bankruptcy).

Trustee Act, 1893, s. 48 (conviction for felony).

Law of Distress Amendment Act, 1908, ss. 1, 2 (distress — with exceptions).

Finch v. E. of Winchelsea (1715) 1 P. Wms., at p. 282, *per* Lord Cowper, C.

Foley v. Burnell (1783) 1 Bro. C. C., at p. 278, *per* Lord Thurlow, C. (execution for debt).

Duncan v. Cashin (1875) L. R. 10 C. P. 554.

Wright v. Redgrave (1879) 11 Ch. D., at p. 33, *per* Bramwell, L. J.

[For some time after the passing of the Judicature Act, 1873, there was some doubt as to how the interest of the beneficiaries should be protected on a seizure by the trustee's creditor; the old practice of applying to Chancery for an injunction against the sheriff having been forbidden by s. 24 (5) of the Judicature Act. But

it is now settled, that the beneficiaries may either call upon the sheriff to interplead (*Duncan v. Cashin, ubi sup.*), or may apply in the Division which issued the judgment (*Wright v. Redgrave, ubi sup.*).]

(b) As to this, see *ante* § 1828, n.

[Though the authorities are somewhat scanty, it is unquestionable that the beneficiary's interest could not now be made to suffer by claims to dower, curtesy, and escheat, against the trustee's estate. On the other hand, these incidents now attach to the interest of the beneficiary (*ante*, Tit. I, Sect. XI, §§ 1306, 1307).]

*Vesting
orders*

1831. Where for any reason there is a difficulty with regard to the transfer of, or dealing with, trust property, being land, stock (including shares in British ships) or choses in action, owing to a defect of or uncertainty in title, or owing to the incapacity of a person in whom the title is vested to deal with the property, or to the absence from the country of a trustee, or to the wilful refusal of a trustee to convey when he ought to do so, the Court may, on the application of any person beneficially interested, make a vesting order, vesting such property, or, (in the case of stock) the right to transfer and receive dividends, in any such manner, and for any such estate or interest, as the Court may direct, or may make an order vesting the right to transfer such property in any person whom the Court may direct.

Trustee Act, 1893, ss. 26, 27, 32, 33, 35, 36.

[The provisions of the above sections are very long, and cannot be set out in detail. But it is believed that the § accurately represents the result of them. When the property in question is copyhold, the rights of the lord of the manor are saved (*ibid.*, s. 34).

Where land is subject to the contingent rights of unborn persons, who, if born, would be entitled as trustees, the Court may make an order releasing the rights or vesting the contingent estate of the unborn persons (*ibid.*, s. 27). It seems curious that there should, apparently, be no statutory provision of this kind on the subject of chattels corporeal.]

TITLE VIII—TRANSFER OF THE BENEFICIAL INTEREST

*Involuntary
alienation of
beneficial
interest*

1832. A beneficial interest in property held on trust is (subject to Bk. I, Sect. III, Title II, §§ 105–108, *ante*) liable to involuntary alienation on the death, bankruptcy, or suffering of judgment of the beneficial owner, to the same extent as any other property belonging to him beneficially (see *ante*, Sect. V, §§ 1453, 1457; Sect. XI, §§ 1604, 1605, 1607; Sect. XIV, Tit. II, §§ 1705–1711, *ante*).

Judgments Act, 1838, ss. 11, 13, 14.
Bankruptcy Act, 1914, s. 38.

[Generally speaking, beneficial interests in trust property can only be taken in execution by the appointment of a receiver (Judgments Act, 1838, s. 13). But it would seem that chattels corporeal held in trust for the debtor solely can be seized under a Fi. Fa., at any rate with the leave of the Court (*Horsley v. Cox* (1869) L. R. 4 Ch. App., at p. 100, *per* Lord Hatherley, C.; *Bennett v. Powell* (1855) 3 Drew. App. 326, *per* Kindersley, V. C.; *Stevens v. Hince* (1914) 110 L. T. 935).]

*Voluntary
alienation*

1833. Subject to Bk. I, Sect. III, Tit. II, §§ 105–108, *ante*, a beneficiary may freely transfer his interest. But every voluntary transfer of a beneficial interest in trust property will be void unless it is by testament,^(a) or by writing signed by the party granting or assigning the same.^(b)

- (a) Wills Act, 1837, s. 3.
 (b) Statute of Frauds (1677) s. 9. This is one great difference between a trust interest and an ordinary chose in action (see *ante*, Sect. XIV, Tit. I, § 1702).

1834. Transfers of beneficial interests in pure personalty take effect in the order in which notices of such transfers are received by the trustee ^(a) after he has acquired control of the trust property. ^(b) Notice to one of co-trustees is notice to all; ^(c) but if notice is given only to one or more of co-trustees, not to all of them, and the trustee or trustees who have received notice die without having, in fact, communicated such notice to their co-trustees, a subsequent *bonâ fide* transferee who, without notice of the previous transfer, gives notice to the then existing trustee or trustees, will take priority over the earlier transferee. ^(d)

*Rule in
Dearle v.
Hall*

- (a) *Dearle v. Hall* (1828) 3 Russ. 1.

[The rule in *Dearle v. Hall* has no application to interests in land (*Ward v. Duncombe* [1893] A. C., at p. 390, *per* Lord Macnaghten). But it applies to interests in trust moneys invested on mortgage of land, and to the proceeds of land settled on trust for sale (*Lloyds' Bank v. Pemson* [1901] 1 Ch. 865).]

- (b) *Re Dallas* [1904] 2 Ch. 385.
 (c) *Ward v. Duncombe* [1893] A. C. 369.

[Consequently, so long as the trustee who received the notice continues to be a trustee, the person giving notice cannot be ousted (*Ward v. Duncombe*, *ubi sup.*). Trustees, however, are not deemed to have notice of an assignment of his beneficial interest by one of their number who is also a beneficiary; unless in fact notice reaches them (*Brown v. Savage* (1859) 4 Drew. 635).]

- (d) *Re Phillips' Trusts* [1903] 1 Ch. 183.

[On the other hand, a transferee who gives notice to all the trustees for the time being is safe; even if they all die and are replaced by new trustees who, in fact, do not know of the transfer (*Re Wasdale* [1899] 1 Ch. 163). Where there are successive assignments of the beneficial interest, and some of the assignees do, and some do not, give notice to all the trustees, difficult questions of priority may arise, which are probably settled by the application of the doctrine of subrogation (cf. *Re Lord Kensington* (1885) 29 Ch. D. 527). Trustees are not bound to give information to strangers about the state of the trust fund; but, if they do, they are bound by their statements, and must make good any loss incurred by the enquirer on the faith of them (*Low v. Bouverie* [1891] 3 Ch. 82).]

BOOK IV

FAMILY LAW

SECTION I

MARRIAGE

TITLE I—CELEBRATION OF MARRIAGE

1835. A marriage may be celebrated in Eng- *Forms of*
land: — *marriage*

- (i) according to the rites of the Church of
England; *or*

Marriage Act, 1836, s. 1.

[In the case of a marriage according to the rites of the Church of England, it is not necessary that the words of the marriage service should be spoken by the parties, if their consent is sufficiently evidenced; and deaf and dumb persons may show their consent by signs (*Harrod v. Harrod* (1854) 1 K. & J. 4).]

- (ii) according to the usages of the Society of
Friends ('Quakers'); *or*

Marriage Act, 1823, s. 31.

Marriage Act, 1836, s. 2.

10 & 11 Vict. (1847) c. 58.

Marriage (Society of Friends) Act, 1860, s. 1.

Marriage (Society of Friends) Act, 1872, s. 1.

[If both parties are not members of the Society of Friends, the marriage is not valid unless, when notice is given to the Super-

intendent Registrar (*post*, § 1840) a certificate of a registering officer of the Society of Friends is produced, to the effect that the marriage is authorized by the rules of the Society (Act of 1872, s. 1), which are proved by a copy purporting to be signed by the recording clerk for the time being of the Society (Act of 1860, s. 1).]

- (iii) according to the usages of the Jews (where both parties are Jews); *or*,

Marriage Act, 1823, s. 31.

Marriage Act, 1836, s. 2.

10 & 11 Vict. (1847) c. 58.

- (iv) according to such form and ceremony as the parties may see fit to adopt, provided that each party shall say: "I do solemnly declare, that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D." and ["I call upon these persons here present to witness that] I, A. B., do take thee, C. D., to be my [lawful] wedded wife" (*or* "husband").

Marriage Act, 1836, s. 20.

[The Welsh equivalent of the above words may be used in places where Welsh is commonly used or preferred (Births and Deaths Registration Act, 1837, s. 23; Marriage Act, 1898, s. 14). It does not appear that a translation into any other language would be valid. In the case of a marriage celebrated in the presence of an 'authorized person,' under the Marriage Act, 1898, ss. 5, 6, (*post*, § 1837) the words in square brackets may be omitted.]

*Forms of
Established
Church*

1836. A marriage according to the rites of the Church of England must be celebrated by, and in the

presence of, a minister in Holy Orders of the Church of England, and of two or more witnesses.^(a) A person (even though in Holy Orders) cannot validly celebrate his own marriage.^(b)

- (a) Marriage Act, 1823, s. 28.
R. v. Millis (1844) 10 Cl. & F. 534.

[The requirement of two witnesses is directory only; and a marriage has been held valid, although two witnesses were not present (*Wing v. Taylor* (1861) 30 L. J. (P. M. & A.) 258). In Ireland it has also been held that a marriage between Roman Catholics, by a Roman Catholic priest, though only in the presence of one witness, and though irregular by the law of the Roman Catholic Church, is valid by the common law of England (*Ussher v. Ussher* [1912] 2 Ir. R. 445.)]

- (b) *Beamish v. Beamish* (1861) 9 H. L. C. 274.

1837. A marriage not according to the rites of the Church of England, or the usages of the Quakers or Jews, must be celebrated, if in a registered building, in the presence of some Registrar of Births, Deaths, and Marriages, of the district in which such building is situated,^(a) or in the presence of an 'authorized person' appointed under the Marriage Act, 1898;^(b) if at the office of a Superintendent Registrar of Births, Deaths, and Marriages, in the presence of him and of some Registrar of the district.^(c) In each of these cases the presence of two witnesses is also required.^(d)

*Forms of
other mar-
riages*

- (a) Marriage Act, 1836, s. 20. (A registered building is a place of worship belonging to some religious body other than the Church of England, and duly registered according to law (*ibid.*, s. 18).)
(b) S. 6. (An 'authorized person' is a person duly authorized by the

trustees or other governing body of the building to solemnise the marriage (*ibid.*.)

(c) Marriage Act, 1836, s. 21.

(d) *Ibid.* ss. 20, 21; Marriage Act, 1898, s. 6.

[There is no statutory requirement as to the presence of any officiating minister or witnesses in the cases of Quaker and Jewish marriages.]

*Notice before
Church of
England
marriage*

1838. Where a marriage is to be celebrated according to the rites of the Church of England, it is necessary that, within three months before the celebration of such marriage: —

- (i) public notice of such intended marriage ('publication of banns') be given audibly upon three Sundays during morning service (or, if there is no morning service, during evening service), immediately after the Second Lesson, in some church of the parish in which the parties shall dwell, or, if they dwell in different parishes, in a church of each such parish; *or*,

Marriage Act, 1823, ss. 2, 9. ('Church' includes certain chapels of the Church of England licensed for the purpose by the bishop (Act of 1823, ss. 3, 4; Marriage Act, 1836, s. 26). There appears to be no statutory definition of 'dwelling' for this purpose).

[In the cases of marriages of officers, seamen, and marines of His Majesty's Navy, the Naval Marriages Act, 1908, s. 1, makes provision for the publication of banns on board ship.]

- (ii) a special licence be obtained from the Archbishop of Canterbury; *or*,

25 Hen. VIII (1533) c. 21, ss. 2-4.

Marriage Act, 1823, s. 20.

Marriage Act, 1836, s. 1.

- (iii) a common licence be obtained from the Vicar General of the Archbishop of Canterbury or the Archbishop of York, or from the Chancellor or surrogate of a bishop of a diocese ; *or*,

25 Hen. VIII (1533) c. 21, s. 9.
Marriage Act, 1823, ss. 10-19.
Ecclesiastical Jurisdiction Act, 1847, s. 5.

- (iv) a Superintendent Registrar's certificate be obtained, as provided in § 1840, *post*.

Marriage Act, 1836, ss. 4, 5 (ss. 6 & 7 are repealed).
Births and Deaths Registration Act, 1837, s. 36.

1839. When a marriage is to be celebrated not in accordance with the rites of the Church of England, it is necessary that, within three months before the celebration of such marriage, either : — *Notice before
other
marriages*

- (i) a Superintendent Registrar's certificate be obtained, as provided in § 1840, *post* ; *or*,

Marriage Act, 1836, s. 4.

- (ii) a Superintendent Registrar's certificate and licence be obtained as provided in § 1841, *post*.

Marriage and Registration Act, 1856, ss. 2, 6.

1840. A Superintendent Registrar's certificate is obtained as follows : — *Superin-
tendent
Registrar's
certificate*

- (i) Notice in writing of the intended marriage must be given by one of the parties to the

Superintendent Registrar of the district in which the parties have had their usual place of abode and residence for not less than seven days next preceding, or, if they dwell in different districts, to the Superintendent Registrar of each district, in a prescribed form.^(a) The Superintendent Registrar must forthwith enter a copy of such notice in a book kept by him, called the Marriage Notice Book,^(b) and cause the notice to be suspended or affixed in his office, in some conspicuous place.^(c)

- (a) Marriage Act, 1836, s. 4.
Marriage and Registration Act, 1856, ss. 2, 4, and Sched. A.
- (b) Marriage Act, 1836, s. 5.
- (c) Marriage and Registration Act, 1856, s. 4.

- (ii) Such notice, or a copy thereof, must remain exhibited in the office of the Superintendent Registrar for twenty-one days.

Marriage and Registration Act, 1856, s. 4.

- (iii) After twenty-one days from the entry of such notice in the Marriage Notice Book, the Superintendent Registrar must (subject to § 1845, *post*) issue to the person giving such notice a certificate in the prescribed form of such notice having been given.

Marriage and Registration Act, 1856, s. 4; and Sched. B.

1841. A Superintendent Registrar's certificate and licence is obtained as follows:—

- (i) Notice in writing of the intended marriage, stating that such marriage is to be by licence, must be given by one of the parties to the Superintendent Registrar of the district in which the party giving such notice has had his usual place of abode or residence for the space of fifteen days immediately preceding.^(a) The Superintendent Registrar must forthwith enter a copy of such notice in the Marriage Notice Book; ^(b) but the notice must not be suspended in the office of the Superintendent Registrar.^(c)

(a) Marriage and Registration Act, 1856, ss. 2, 6.

(b) Marriage Act, 1836, s. 5.

(c) Marriage and Registration Act, 1856, s. 5.

- (ii) After the expiration of one whole day after the entry of such notice in the Marriage Notice Book, the Superintendent Registrar must (subject to § 1845, *post*) issue to the person giving such notice, a certificate of such notice having been given, and also a licence to marry.

Marriage and Registration Act, 1856, s. 9, and Sched. B.

1842. The consent of the following persons is (subject to § 1843, *post*) required for the

Consent to marriage

marriage of any minor, not being a widow or widower:—

- (i) the father of the minor, if living;

Marriage Act, 1823, s. 16.

- (ii) if the father is not living, the guardians of the minor or one of them (including the mother), not being guardians or a guardian appointed by the Court;

Marriage Act, 1823, s. 16.

Guardianship of Infants Act, 1886, ss. 2-4.

- (iii) if there is no such guardian, the mother, being unmarried;

Marriage Act, 1823, s. 16.

[Since the Act of 1823 was passed, the mother of a minor has been made, in all cases, a guardian of the minor after his father's death (Guardianship of Infants Act, 1886, s. 2). *Quære*: if she has been removed from that position by the Court under s. 6 of that Act, can she still, if unmarried, consent under s. 16 of the Act of 1823?]

- (iv) if there is no mother unmarried, the guardian or guardians (if any) appointed by the Court, or one of them.

Marriage Act, 1823, s. 16.

If there is no such person, no consent is required.

Marriage Act, 1823, s. 16.

*Consent by
Court*

1843. If the person whose consent to the marriage is required under § 1842 is insane, or (not

being the father of the minor^(a) is beyond the seas, or if such consent (except in the case of the father^(a)) is unreasonably withheld, the Court may give its consent to the marriage; and such consent has the same effect as the consent of the person whose consent is required by § 1842.^(b)

(a) *Ex parte I. C.* (1838) 3 Myl. & C. 471.

(b) Marriage Act, 1823, s. 17.

[The absence of consent does not make the marriage void (*R. v. Birmingham* (1828) 8 B. & C. 29; and see *Holmes v. Simmons* (1868) L. R. 1 P. & D., at p. 528). But if the marriage of a minor is procured without consent by the false oath or declaration of one of the parties (§ 1844, *post*), the Attorney or Solicitor General may, at the relation of the person whose consent is required, sue for a forfeiture of any interest in property accruing to such party by reason of the marriage; and the Court may declare a forfeiture, and provide for the settlement of the forfeited property for the purpose of preventing the offending party from deriving any benefit therefrom (Marriage Act, 1823, ss. 14, 23; Marriage and Registration Act, 1856, s. 19).]

1844. When either of the parties to the intended marriage is a minor, not being a widow or widower, the person applying for such a licence as is described in § 1838 (iii), *ante*, or for such certificate or certificate and licence as is referred in § 1839, *ante*, must state on oath, in the case of a licence under § 1838 (iii), or make a solemn declaration in the case of a certificate, or certificate and licence, under § 1839, that the consent of such person (if any) whose consent is required under § 1842, *ante*, has been obtained, or that there is no such person. No such licence, *Evidence of consent*

certificate, or certificate and licence may be issued unless such statement on oath or declaration (as the case may be) has been made.

Marriage Act, 1823, s. 14.

Marriage and Registration Act, 1856, s. 2.

[For the effect of a false oath or declaration under this §, see note to § 1843, *ante*.]

*Forbidding
the marriage*

1845. A person whose consent is required under § 1842, *ante*, may:—

- (i) at the time of the publication of the banns of the marriage, and in the church where such banns are published, openly declare his dissent from such marriage. The effect of such declaration is to make the publication of banns void;

Marriage Act, 1823, s. 8.

- (ii) forbid the issue of the Superintendent Registrar's certificate, or certificate and licence, referred to in § 1839, *ante*, by making an entry in a prescribed form to that effect in the Marriage Notice Book, before the issue of the Superintendent Registrar's certificate. No such certificate, or certificate and licence, may be issued after such prohibition; and such certificate, or certificate and licence, if issued after such prohibition, is void;

Marriage Act, 1836, ss. 9, 10, 40.

- (iii) enter a caveat against the issue of such licence as is described in § 1838 (iii), or such certificate or licence as is referred to in § 1839, *ante*. After the entry of such caveat, no licence, certificate, or certificate and licence, may be issued until such caveat has been withdrawn or disposed of.

Marriage Act, 1823, s. 11.

Marriage Act, 1836, s. 13.

1846. A marriage celebrated in accordance with the rites of the Church of England must be celebrated: — *Place of
Church of
England
marriage*

- (i) if with publication of banns, in the church or one of the churches in which the banns have been published;

Marriage Act, 1823, s. 2.

- (ii) if a special licence under § 1838 (ii) *ante*, has been obtained, in the place specified in such licence;

Marriage Act, 1823, s. 20.

Marriage Act, 1836, s. 1.

- (iii) if a common licence under § 1838 (iii), *ante*, has been obtained, in the church specified in the licence, which must be a church or public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married

has been for fifteen days immediately before the granting of such licence ;

Marriage Act, 1823, s. 10.

(iv) if a Superintendent Registrar's certificate under § 1838 (iv), *ante*, has been obtained, in the church specified in such certificate.

Marriage Act, 1836, s. 42.

*Place of
other
marriages*

1847. A marriage not celebrated in accordance with the rites of the Church of England must be celebrated in the place specified in the notice and certificate described in §§ 1840, 1841, *ante*.^(a) Such place must (except in the case of marriages celebrated in accordance with the usages of the Quakers or Jews) be a registered building, or the office of the Superintendent Registrar.^(b)

(a) Marriage Act, 1836, s. 42.
(b) *Ibid.*, ss. 20, 21.

[As a rule, the registered building must be in the district in which one of the parties has dwelt for the required time. But there are exceptions (Marriage Act, 1840, ss. 1, 2).]

*Canonical
hours*

1848. Every marriage, unless a special licence has been obtained under the provisions of § 1838 (ii) *ante*, must be celebrated with open doors, between the hours of eight in the morning and three in the afternoon.

CELEBRATION OF MARRIAGE 1167

Marriage Act, 1836, ss. 1, 20.

Marriage Act, 1886, s. 1 (1).

[*Quære*: Whether this provision applies to marriages celebrated according to the usages of Quakers or Jews?]

1849. A marriage may be validly celebrated out of England in any of the following ways: — *Marriages celebrated abroad*

- (i) according to the form recognized as valid by the law of the country in which the marriage takes place;

Dalrymple v. Dalrymple (1811) 2 Hagg. Con. 54.

Swift v. Kelly (1835) 3 Knapp, 257 (P. C.).

Simonin v. Mallac (1860) 2 Sw. & Tr. 67.

Swifte v. A. G. for Ireland [1912] A. C. 276.

- (ii) according to the form recognized as valid by the law of the State to which the parties belong, in cases where the marriage is celebrated either (a) in a place in which the parties enjoy the privilege of ex-territoriality,^(a) or (b) in a place in which the use of the form recognized by the local law is impossible;^(b)

(a) *R. v. Brampton* (1808) 10 East, 282.

(b) *Ruding v. Smith* (1821) 2 Hagg. Con. 371.

Dicey, *Conflict of Laws*, (2nd edn.) pp. 614, 622.

[The 'form recognized as valid by the law of the State to which the parties belong' probably means, in the case of British subjects, the form recognized as valid by the English common law, *i. e.* a religious ceremony performed by a minister of the Church of England or of the Roman Catholic or some other episcopal Church (*ibid.*, p. 620, n. (2); *Catherwood v. Caslon* (1844) 13 M. & W. 261).]

- (iii) by a chaplain or officer or some other person officiating under the orders of the commanding officer of a British army, within the lines of such army serving abroad;

Foreign Marriage Act, 1892, s. 22.

- (iv) according to the provisions of the Foreign Marriage Act, 1892, in cases where the marriage is celebrated outside the United Kingdom, between persons of whom one at least is a British subject.

Foreign Marriage Act, 1892, ss. 1-21. (Under this Act, a marriage may be celebrated either in accordance with the rites of the Church of England, or according to such form and ceremony as the parties may see fit to adopt provided that they use the words set out in § 1835 (iv), *ante*, including those in square brackets, but omitting the word 'do' (s. 8 (3)). Whatever form is adopted, a Marriage Officer (such as a British ambassador or consul, or the Commander of one of His Majesty's ships), and two witnesses, must be present. But another person may celebrate the marriage (s. 8 (2)). Notice of the intended marriage, similar to that required by § 1840 (i), *ante*, must be given to the Marriage Officer, not less than fourteen days, or more than three months, before the marriage (ss. 2, 6, 8 (1)). As regards consents of parents and guardians to the marriage of minors abroad, provisions similar to those of §§ 1842, 1843, *ante*, apply (s. 4). The marriage must be celebrated at the official house of the Marriage Officer, or on board one of His Majesty's ships on a foreign station (ss. 8 (2), 13 (2)), in the former case with open doors, and between the hours of eight in the forenoon and three in the afternoon (s. 8 (2)).)

[The Merchant Shipping Act, 1894, ss. 240 (6), 253 (i) (viii), appears to contemplate the possibility of marriage being celebrated on board a British merchant ship. But there seems to be no authority as to the manner in which such a marriage may be celebrated. For the facilitation of colonial marriages, and of marriages in the United Kingdom of British subjects resident in the colonies, see Marriage of British Subjects (Facilities) Act, 1915, and Orders in Council (if any) thereunder.]

TITLE II — INVALID AND VOIDABLE MARRIAGES

1850. A marriage celebrated in England is void *Informality generally* unless celebrated substantially in one of the ways specified in Tit. I, §§ 1836, 1837, *ante*.

Marriage Act, 1823, s. 22.

Marriage Act, 1836, s. 42.

The Queen v. Millis (1843) 10 Cl. & F. 534.

1851. A marriage purporting to be celebrated in accordance with the rites of the Church of England *In Church of England marriages* is void:—

- (i) if, to the knowledge of both parties, the marriage (not being a marriage by special licence) is celebrated in any place other than such church as is described in Tit. I, § 1846 (i), *ante*;
- (ii) if, to the knowledge of both parties, the marriage (not being a marriage by special licence) is celebrated without due publication of banns, or such licence or certificate as is described in Tit. I, § 1838, *ante*;
- (iii) if, to the knowledge of both parties, the marriage is celebrated by a person not in Holy Orders.

Marriage Act, 1823, s. 22.

Marriage Act, 1836, s. 42

[The publication of banns under a name known to both parties to be false in any material particular, with the object of concealing identity, avoids the marriage (*Tongue v. Tongue* (1836) 1 Moo. P. C. 91 (concealment of Christian name); *Midgley v. Wood* (1860) 30 L. J. (P. M. & A.) 57 (false Christian name); *Wormald v. Neale* (1868) 19 L. T. 93 (false surname)). If the defect is known to one party only, the marriage is valid (*R. v. Wroxtton* (1833) 4 B. & Ad. 640 (false name); *Gompertz v. Kensit* (1872) L. R. 13 Eq. 369 (omission of Christian names); *Templeton v. Tyree* (1872) L. R. 2 P. & M. 420 (incorrect ages); *Greaves v. Greaves*, *ibid.* 423 (no banns or licence)). A misdescription in a licence (at any rate unless fraudulent) will not invalidate a marriage (*Cope v. Burt* (1809) 1 Hagg. Con. 434; *Wheatley v. Wheatley* (1814) 2 Hagg. Con. 175; *Haswell v. Haswell* (1881) 51 L. J. (P. D. & A.) 15). In *Cope v. Burt*, *ubi sup.*, at p. 439, and in *Lane v. Goodwin* (1843) 4 Q. B., at p. 366, the opinion was expressed, that a licence might not be valid if obtained for one person with the intention that it should be used for another. As to misdescription in a notice leading to a Superintendent Registrar's certificate, see next §. A marriage celebrated by a person not in Holy Orders, but supposed by the parties to be in Holy Orders, is, probably, valid. But the point is doubtful (*Hawke v. Corri* (1820) 2 Hagg. Con., at p. 288; *R. v. Ellis* (1888) 16 Cox, at p. 471; Marriages Validation Act, 1888).]

*In other
marriages*

1852. A marriage purporting to be celebrated in one of the ways described in Tit. I, § 1835, *ante*, other than a marriage according to the rites of the Church of England, is void:—

- (i) if, to the knowledge of both parties, it is celebrated in some place other than the place specified in the notice and certificate described in Tit. I, §§ 1840 and 1841, *ante*;
- (ii) if, to the knowledge of both parties, it is celebrated without such notice as is described in §§ 1840 and 1841, *ante*, or without

- such certificate and licence (where a licence is necessary) as is therein described ;
- (iii) if, [to the knowledge of both parties, the marriage (not being a marriage according to the usages of the Quakers or Jews), is celebrated without the presence of such Registrar, Superintendent Registrar, or 'authorized person,' as is required under Tit. I, § 1837, *ante*.

Marriage Act, 1836, s. 42.

Marriage Act, 1898, ss. 6 (3); 15.

[A misdescription in a notice leading to the Superintendent Registrar's certificate or licence does not make the marriage void ; even though the misdescription be known to both parties, and fraudulent (*Holmes v. Simmons* (1868) L. R. 1 P. & D. 523 ; *Prowse v. Spurway* (1877) 46 L. J. (P. D. & A.) 49 ; *Re Rutter* [1907] 2 Ch. 593 (surname false to the knowledge of both parties)). Perhaps the notice and certificate or licence would be mere nullities if the name were wholly false (*Holmes v. Simmons*, *ubi sup.*, at p. 529, *per* Lord Penzance). No question as to the correctness of the statement as to the dwelling of either of the parties in the notice can be raised after the marriage has been celebrated (Marriage and Registration Act, 1856, s. 17).]

1853. A marriage is void if either of the parties *Lunacy* was, at the date thereof, a lunatic who had been so found by inquisition or whose person and estate had been committed to the care and custody of particular trustees ; unless he had, before such marriage, been declared sane by a competent Court, or by such trustees or the majority of them.

Marriage of Lunatics Act, 1811.

Turner v. Meyers (1808) 1 Hagg. Con., at p. 417.

*Previous
marriage*

1854. A marriage is void if, at the date thereof, either party was lawfully married to some other person; even if one or both of the parties was ignorant of the previous marriage, or believed that it had been dissolved by death or otherwise.

Re Wilson's Trusts (1865) L. R. 1 Eq. 247; L. R. 3 H. L. 55 (*sub nom. Shaw v. Goula*).

[It is doubtful whether a marriage, validly celebrated according to the law of a country which recognises polygamy, invalidates a subsequent marriage by one of the parties to a third person (*R. v. Naguib* [1917] 1 K. B. 379).]

*Prohibited,
degrees*

1855. A marriage is void :—

- (i) if the parties to it are related to one another lineally, or as brother and sister, uncle and niece, aunt and nephew ;
- (ii) if (subject to § 1856, *post*) one of the parties is related, through a former wife or husband, to the other in one of the degrees or ways specified in (i).

28 Hen. VIII (1535) c. 7, ss. 7, 11.

28 Hen. VIII (1536) c. 16, s. 2.

32 Hen. VIII (1540) c. 38.

1 Eliz. (1558) c. 1, s. 3.

Marriage Act, 1835, s. 2.

R. v. Chadwick (1847) 11 Q. B. 205.

Re Wood (1874) L. R. 9 Ch. App. 670.

[Before the Act of 1835, such marriages were merely voidable by sentence of the Ecclesiastical Court, which could only be pronounced during the lifetime of both parties (Marriage Act, 1835, *pr.*).]

Relationship of the half-blood has in this respect the same effect as relationship of the whole blood ;^(a) and illegitimate blood relationship the same as that of

INVALID AND VOIDABLE MARRIAGES 1173

legitimate.^(b) But illicit carnal connexion does not constitute affinity.^(c)

- (a) *Mette v. Mette* (1859) 28 L. J. (P. & M.) 117 (half-sister of wife).
R. v. Brighton (1861) 1 B. & S. 447 (daughter of illegitimate half-sister of wife).
- (b) *R. v. St. Giles in the Fields* (1847) 11 Q. B. 173, 244.
R. v. Chadwick, *ubi sup.*
R. v. Brighton, *ubi sup.*
- (c) *Wing v. Taylor* (1861) 30 L. J. (P. & M.) 258. (But see the remarks of Jeune, P., in *Moss v. Moss* [1897] P., at p. 266.)

1856. No marriage contracted between a man and his deceased wife's sister (including her half-sister), whether before or after 28th August, 1907, is to be deemed void or voidable, as a civil contract, only because of such affinity; but if, before that day, any such marriage had been annulled, or either party thereto (after the marriage and during the life of the other) had lawfully married another, such marriage is to be deemed to have become void upon the day upon which it was so annulled, or upon which either party thereto so married.

Deceased Wife's Sister's Marriage Act, 1907, ss. 1, 5.

[Before the Act such marriages between persons domiciled in England were void (*Mette v. Mette*, *ubi sup.*; *Brook v. Brook* (1861) 9 H. L. C. 193). The Act of 1907 contains provisions:—

- (i) protecting clergymen from proceedings and penalties for refusing to celebrate such marriages (s. 1) — but this provision does not protect a clergyman from proceedings in respect of his refusal to admit to Holy Communion persons whose marriage is legalized by the Act (*Bannister v. Thompson* [1908] P. 362; *Thompson v. Dibdin* [1912] A. C. 533);

- (ii) saving vested or contingent interests existing at the passing of the Act (see *Re Whitfield* [1911] 1 Ch. 310; *Re Green* [1911] 2 Ch. 275) and the claim of the Crown to Death Duties becoming due before the passing of the Act (s. 2);
- (iii) requiring that the Act shall not affect the devolution or distribution of the estate of any intestate, not being a party to the marriage, who was, at the date of the passing of the Act, and continued till the time of his death, to be a lunatic so found by inquisition (s. 2).

The Act does not authorize marriage between a man and the sister of his divorced wife, during the lifetime of such wife (s. 3 (2); nor does it authorise marriages between the husband and his deceased wife's relatives which would not have been lawful before the Act (*Re Jas. Phillips* [1919] 1 Ch. 128).]

*Age of
capacity*

1857. The marriage of a male under the age of fourteen years, or of a female under the age of twelve years, is voidable at the option of such person, and, possibly, of the other party. Such person, and, possibly, the other party to the marriage, may, when such person attains the prescribed age, either affirm or repudiate the marriage. Cohabitation after attainment of the prescribed age amounts to affirmation of the marriage.

Co. Litt. 79 a.

[Marriages below the ages mentioned do not occur at the present time; though they were formerly not uncommon (See Co. Litt. 33 a; Pollock and Maitland, *History of English Law* (2nd edn.) II, 390-392). In Coke's time it was settled law, that a wife who had attained the age of nine years was entitled to dower, whatever the age of the husband. At an earlier time, it was a question of fact whether she could 'dotem promereri et virum sustinere.']

Insanity

1858. A marriage will be declared void by the Court on the ground of the insanity of either of the

parties, existing at the time of the marriage; if the insanity was such as to prevent the insane party from understanding the nature of the contract of marriage and the duties and responsibilities which it creates.^(a) The sane, as well as the insane, party may apply to the Court to have the marriage declared void on this ground.^(b)

- (a) *Durham v. Durham* (1885) 10 P. D. 80.
Jackson v. Jackson [1908] P. 308.
 (b) *Durham v. Durham, ubi sup.* } (petitions by sane
Hunter v. Edney (1885) 10 P. D. 93 } party).
Turner v. Meyers (1809) 1 Hagg. Con. 414 } (petitions by insane
Hancock v. Peaty (1867) L. R. 1 P. & M. 335 } party).

[It was suggested in *Sullivan v. Sullivan* (1818) 2 Hagg. Con., at p. 246, that intoxication (produced by conspiracy) might be insanity for this purpose. *Quære*: whether the invalidity of the marriage could be asserted on the ground of insanity, otherwise than upon an application to the Court in its matrimonial jurisdiction?]

1859. A marriage may be declared void by the Court on the ground that one of the parties went through the form of marriage without freely consenting thereto. (*Semble*) only the party whose want of consent is alleged may apply to have the marriage declared void on this ground.

- Scott v. Sebright* (1886) 12 P. D. 21 (duress and undue influence) }
Ford v. Stier [1896] P. 1 (parental influence ; petitioner thought she was going through a betrothal only) } (marriage held void).
Cooper v. Crane [1891] P. 369 (respondent had threatened suicide if petitioner would not marry him) } (marriage held valid).

[In none of these cases had the marriage been consummated. *Quære*: whether the invalidity of a marriage could be asserted on the ground of want of consent, otherwise than upon an application to the Court in its matrimonial jurisdiction? (*Lady Fulwood's Case* (1637) Cro. Car., at p. 488).]

*Fraud and
mistake*

1860. Where there is free consent to a marriage, no fraud or mistake inducing the consent is a ground for declaring the marriage void.

Wakefield v. Mackay (1807) 1 Phill., at p. 137.

Ewing v. Wheatley (1814) 2 Hagg. Con., at p. 183.

Sullivan v. Sullivan (1818) *ibid.*, at p. 248.

Moss v. Moss [1897] P. 263 (fraudulent concealment of pregnancy).

Impotence

1861. A marriage may be annulled, at the instance of one of the parties, on the ground of the permanent and incurable incapacity,^(a) existing from the celebration of the marriage, on the part of the other, to have sexual intercourse. The Court may, in its discretion, annul the marriage on the application of an impotent party; but such discretion is one which is very carefully exercised,^(b) and, *semble*, the Court will not annul a marriage at the suit of a merely unwilling party. Such marriages are voidable only, not void; and remain valid until annulled by the Court acting in its matrimonial jurisdiction.^(c)

(a) *M. v. D.* (1885) 10 P. D. 75. (The Court has no power to hold proceedings of this kind *in camera*, merely in the interests of decency (*Scott v. Scott* [1913] A. C. 417).)

INVALID AND VOIDABLE MARRIAGES 1177

- (b) *A. v. A.* (1885) 19 Ir. R. Ch. 403.
G. v. G. (1908) XXV T. L. R. 328.

[But see *Norton v. Seton* (1819) 3 Phill. 147; *Halfen v. Brodington* (1881) 6 P. D. 13; *Turner v. Thompson* (1888) 13 P. D. 37; *Dickinson v. Dickinson*, *ubi sup.* The validity of the marriage cannot be impeached after the death of either party (*A. v. B.* (1868) L. R. 1 P. & M. 559).]

- (c) *Elliott v. Gurr* (1812) 2 Phill. 16.
A. v. B., *ubi sup.*
Dickinson v. Dickinson, *ubi sup.*

[It was at one time thought that persistent refusal to have marital intercourse was itself a ground for a decree (*D. v. D.* [1913] P. 198). The true doctrine is, that it is only evidence of incapacity, which may be rebutted (*Napier v. Napier* [1915] P. 184).]

1862. The Court will refuse to annul a marriage on the ground of such incapacity or unwillingness as is mentioned in § 1861, *ante*, if the petitioner is guilty of ‘insincerity.’^(a) Delay in presenting a petition for annulment, if not satisfactorily explained, is evidence of insincerity; but is not in itself a ground for refusing relief.^(b)

Grievance must be genuine

- (a) *M. v. C.* (1872) L. R. 2 P. & M. 414.
W. v. R. (1876) 1 P. D. 405 (where it is explained (at p. 408) that “the law has always required sincerity in the complainer, that is, a real sense of the grievance complained of, unmixed with any other subsidiary motive, and, as a necessary proof of such sincerity, has also required all reasonable promptitude to be exhibited in seeking legal redress.” — *per* Phillimore, J.).

[But a wife’s petition for nullity has been granted, where she had taken proceedings only after her adultery had been discovered by her husband (*M. v. D.* (1885) 10 P. D. 75; *S. v. S.* [1907] P. 224).]

- (b) *B. v. M.* (1852) 2 Rob. Ecc. 580.
Castleden v. Castleden (1861) 9 H. L. C. 186.
M. v. D. (1885) 10 P. D. 75.

TITLE III — JACTITATION OF MARRIAGE

Grounds for **1863.** If a person persistently and falsely alleges that he is married to another, the latter may, in a suit of jactitation of marriage, obtain a decree forbidding the former to make such allegations. No such decree will be granted in favour of a person who has at any time acquiesced in the making of such allegations by the other party.

Thompson v. O'Rourke [1893] P. 11, 70.

[A judgment in such action is not conclusive for or against the fact of the marriage in proceedings between other parties (e. g. in an indictment for bigamy); and it is not clear that it would be conclusive even between the parties (*Duchess of Kingston's Case* (1776) 20 Howell St. T., at pp. 542-3; 2 Smith L. C. (11th edn.) at pp. 737-8, *per* De Grey, C. J.).]

TITLE IV — RIGHTS AND DUTIES ARISING OUT OF MARRIAGE

1864. Husband and wife are under a duty to each other to cohabit,^(a) unless they have been judicially separated or have mutually agreed to separate,^(b) or unless one party has deprived himself of the right to require cohabitation by committing a matrimonial offence,^(c) or has otherwise so acted as to make it unreasonable that the other party should be required to cohabit.^(d) *Cohabitation*

(a) *Wilkinson v. Wilkinson* (1871) L. R. 12 Eq. 604.

[Cohabitation does not necessarily involve sexual intercourse. At any rate the Court will not make an order for enforcing such intercourse (*Orme v. Orme* (1824) 2 Add. 382; *Rowe v. Rowe* (1865) 34 L. J. (P. D. & A.) 111). But unreasonable refusal of such intercourse justifies the other party in withdrawing from cohabitation (*Davis v. Davis* [1918] P. 85); and a mere offer to live under the same roof is no answer to an action for restitution of conjugal rights (*Wily v. Wily* [1918] P. 1).]

(b) *Clark v. Clark* (1885) 10 P. D. 188.

[But the existence of a separation deed is not always a bar to a petition for restitution of conjugal rights, *e.g.* where covenants in the deed have been broken (*Kennedy v. Kennedy* [1907] P. 49; *Looker v. Looker* [1918] P. 132).]

(c) *i.e.* conduct such as adultery, cruelty, or desertion, which would entitle the injured party to sue for divorce or judicial separation (see *post*, Tit. V).

(d) *Russell v. Russell* [1895] P. 315.

[An agreement for separation entered into before marriage is, of course, void, as opposed to public policy (*Brodie v. Brodie* [1917] P. 271).]

1865. If one party refuses to cohabit, the other may obtain from the Court a decree for restitution *Restitution of conjugal rights*

of conjugal rights.^(a) Such a decree cannot be enforced by attachment; but, where it is obtained by the wife, the Court may order that, in the event of the decree being disobeyed, the husband shall make to her such periodical payments as may be just, and may make an order for enforcing or securing to the wife such payments^(b) during the joint lives of the parties or any shorter period. Where the decree is obtained by the husband, and the wife is entitled to property, or is in receipt of any profits of trade or earnings, the Court may order a settlement to be made of such property, for the benefit of the husband and the children of the marriage, or of either or any of them, or may order part of such profits of trade or earnings to be periodically paid to the husband for his own benefit, or to the husband or any other person for the benefit of the children of the marriage, or either or any of them.^(c)

(a) Such an order is not, however, a matter of right, even for an innocent petitioner (*Greene v. Greene* [1916] P. 188).

(b) Matrimonial Causes Act, 1884, s. 2.

Tangye v. Tangye [1914] P. 201 (overruling *Clutterbuck v. Clutterbuck* (1913) 108 L. T. 573).

[But such an order must not be made as a penalty, with a view of enforcing the decree for restitution (*Tangye v. Tangye, ubi sup.*).]

(c) Matrimonial Causes Act, 1884, s. 3.

[As to the effect of disobedience to an order for restitution in constituting statutory desertion, see *post*, Tit. V, §§ 1874, 1880. As to the right of the husband to sue third person through whose acts he is deprived of the *consortium* of his wife, see *ante*, Bk. II, Pt. III, Sect. V, Tit. II, §§ 950-954. As to possible rights of the wife in a similar case, see *ibid.* §§ 954, 955. As to the husband's claim for damages against a person who commits adultery with the wife, see *post*, Tit. V, §§ 1895, 1896.]

1866. A husband is not entitled to use force, or to keep his wife in confinement, for the purpose of compelling his wife to live with him; ^(a) nor is he entitled to a writ of Habeas Corpus for the purpose of restoring her to his custody. ^(b)

*Husband
may not
coerce wife*

- (a) *R. v. Jackson* [1891] 1 Q. B. 671. (The husband was compelled by a writ of Habeas Corpus to restore his wife to liberty. It was left open whether a husband might not use force to restrain his wife from matrimonial misconduct (*ibid.*, at pp. 679, 683, 685). It has never been suggested that the wife has any right to use force against her husband to compel him to live with her.)
- (b) *R. v. Leggatt* (1852) 18 Q. B. 781.

1867. It is the duty of a husband to maintain his wife according to his estate and condition; ^(a) unless they are living apart through her fault. ^(b)

*Maintenance
by husband*

- (a) *Jenkins v. Tucker* (1788) 1 H. Bl., at p. 94, *per* Gould, J.
Read v. Legard (1851) 6 Exch. 636.
- (b) *Hindley v. Westmeath* (1827) 6 B. & C. 200.
R. v. Flinton (1830) 1 B. & Ad. 227.
Johnston v. Sumner (1858) 3 H. & N. 261.
Culley v. Charman (1881) 7 Q. B. D. 89.

[The husband's liability may be enforced (i) by criminal proceedings under the Vagrancy Act, 1824, ss. 3, 4, and the Poor Relief (Deserted Wives and Children) Act, 1718, s. 1, if the wife in consequence of the husband's neglect becomes chargeable to the Poor Law authorities, (ii) by an order of a court of summary jurisdiction for payment to the Poor Law authorities towards her support (Poor Law Amendment Act, 1868, s. 33), (iii) by proceedings under the Summary Jurisdiction (Married Women) Act, 1895, ss. 4, 5, whereby an order for payment of a weekly sum not exceeding two pounds can be obtained, (iv) by means of a suit for restitution of conjugal rights (see *ante*, § 1865) or for judicial separation (see *post*, Tit. V, §§ 1880–1884). The husband's duty to maintain his wife is also recognized in the rules relating to the wife's power to pledge the husband's credit (see *ante*, Bk. I, Sect. III, Tit. IV,

§§ 132, 133). It appears to be generally assumed that the husband is entitled to determine the place of residence, and the scale of living. But there is little (if any) authority on the point.]

*Liability of
wife*

1868. A wife is under no liability to maintain her husband, except that, if she has separate estate, and her husband becomes chargeable to a Poor Law authority, a court of summary jurisdiction may make and enforce such order against her for the maintenance of her husband as it may make and enforce, under the Poor Law Amendment Act, 1868, s. 33, against a husband for the maintenance of his wife if she becomes chargeable to a Poor Law authority.

Married Women's Property Act, 1882, s. 20.

[For the provisions of the Poor Law Amendment Act, 1868, s. 33, see § 1867, note (ii).]

*Funeral of
wife*

1869. A husband is liable for expenses reasonably incurred in respect of the funeral of his wife,^(a) even though she was living apart from him at her death,^(b) and is entitled to be repaid or to retain, out of her property, any such expenses paid by him.^(c)

(a) *Jenkins v. Tucker* (1788) 1 H. Bl. 90.

(b) *Ambrose v. Kerrison* (1851) 10 C. B. 776.

Bradshaw v. Beard (1862) 12 C. B. N. S. 344.

[*Quære*: if she had been living apart from him against his will and without excuse.]

(c) *Gregory v. Lockyer* (1821) 6 Madd. 90.

Willeter v. Dobie (1856) 2 K. & J. 647.

Re McMyn (1886) 33 Ch. D. 575.

[In the two earlier cases, the wife had by her testament charged the separate property with payment of funeral expenses. But *Re McMyn* (in which the husband, being executor, was held entitled to retain funeral expenses, although the estate was insufficient to pay creditors) shows that the husband's right does not depend on there being any charge by will.]

1870. When a wife permits her husband to receive the income of her separate estate for their joint purposes, while the parties are living together and the husband is maintaining the wife, it is presumed that it was intended that such income should become the property of the husband.

*Wife's
income re-
ceived by
husband*

Caton v. Rideout (1849) 1 Mac. & G. 599.

Re Dixon [1900] 2 Ch., at p. 280, *per* Rigby, L. J.

[There is no such presumption when accumulations of the wife's income have been used to make a purchase in the husband's name; and the burden of proof in such a case is on the husband to show that a gift to him was intended (*Mercier v. Mercier* [1903] 2 Ch. 98). Similarly, where the husband receives capital belonging to the wife's separate estate, the burden of proof is on him to show that it was a gift (*Dixon v. Dixon* (1878) 9 Ch. D. 587; *Re Flamank* (1889) 40 Ch. D. 461).]

1871. When husband and wife are living together,^(a) or only temporarily living apart,^(b) and the wife makes savings out of money given to her by the husband for household purposes, or for the maintenance of herself and her children, such savings, and any investments representing them, belong

*Wife's
savings*

Q Q

to the husband; unless there is evidence that he intended them to be her property.

- (a) *Lady Tyrrell's Case* (1674) Freeman, K. B. 304.
Barrack v. McCulloch (1856) 3 K. & J., at p. 114; *per* Wood,
 V. C.

[See also *Mews v. Mews* (1852) 15 Beav. 529 (savings of poultry and dairy business carried on by wife on husband's farm). The rule does not apply to the wife's savings from her separate property (*Messenger v. Clarke* (1850) 5 Exch., at p. 392, *per* Alderson, B.; *Re Mackenzie* [1911] 1 Ch. 578).]

- (b) *Messenger v. Clarke* (1850) 5 Exch. 388.
Birkett v. Birkett (1908) 98 L. T. 540.

[In *Slanning v. Style* (1734) 3 P. Wms. 334, the expressions of the husband, and in *Brooke v. Brooke* (1858) 25 Beav. 342, the duration of the separation, and other circumstances, were sufficient to prevent the husband from claiming the savings (see *Birkett v. Birkett*, *ubi sup.*).]

NOTE

Marriage does not, since the passing of the Married Women's Property Acts, 1882-1908, confer any rights on the husband in the wife's property, except rights of intestate succession which may be defeated by the wife's testament; and the wife's right of dower in respect of her husband's real estate has, by the Dower Act, 1833, been converted into a mere right of intestate succession, which may be defeated by the husband's deed or testament. (As to these, see *post*, Book V, Sect. II.) So too, any rights (other than rights of intestate succession defeasible by the husband's testament) which the wife may have had to succeed to her husband's personalty by local custom, were abolished by the statutes 4 & 5 W. & M. (1692) c. 2; 7 & 8 W. III (1695) c. 38; 2 & 3 Anne (1703) c. 5; 11 Geo. I (1724) c. 18, ss. 17-18. The relations of husband and wife with regard to property, and liability for contract and tort, are dealt with in Bk. I, Sect. III, Tit. I, § 71, Tit. II, §§ 105-108, Tit. IV, §§ 132, 133, 136, 137, Bk. III, Sect. VII, Tit. II, §§ 1506-1512, and Sect. XII, §§ 1613, 1614. It may be noted here, in relation to Bk. I, Sect. III, Tit. I, § 71, *ante*, that, by s. 125 of the Bankruptcy Act, 1914, (i) a married woman who carries on a trade or business, whether separately from

her husband or not, is now subject to the bankruptcy laws as if she were a *feme sole*; (ii) in case of a married woman so carrying on a trade or business, a judgment may be made available for bankruptcy proceedings against her as though she were personally bound to pay the judgment debt; (iii) that, by s. 52, if a married woman is made bankrupt, her property which is subject to a restraint on anticipation may be made available for distribution among her creditors; and (iv) that, by s. 36, a husband or wife is not allowed to claim any dividend as a creditor in the other's bankruptcy, in respect of money or other property lent or entrusted to the bankrupt for purposes of trade, until all claims of other creditors for valuable consideration in money or money's worth have been satisfied. (The Conveyancing Act, 1881, s. 39, on which Bk. I, Sect. III, Tit. II, § 107, *ante*, is founded, has been amended by the Conveyancing Act, 1911, s. 7.) When a married woman is joint author with her husband of a work, her interest in the copyright is her separate property (Copyright Act, 1911, s. 16 (4)).

TITLE V — NULLITY, DIVORCE, AND JUDICIAL SEPARATION

Nullity

1872. The Court may pronounce a decree declaring a reputed or voidable marriage to be null and void on any of the grounds specified in Title II, *ante*; but subject to the conditions and in the discretion in that Title described.^(a) Such a decree is, in the first instance, a decree *nisi* only, not to be made absolute till after the expiration of six months from the pronouncing thereof, or such shorter time (not less than three months) as the Court shall specially order; and upon cause being shown in the meantime to the Court by any person (including the King's Proctor) the Court may refuse to make absolute such decree *nisi*, on the ground of collusion, or on the ground that material facts were not brought before the Court.^(b)

(a) Matrimonial Causes Act, 1857, s. 6.

(b) Matrimonial Causes Act, 1860, s. 7.

Matrimonial Causes Act, 1866, s. 3.

Matrimonial Causes Act, 1873, s. 1.

Watton v. Watton (1866) L. R. 1 P. & M. 227. (This was a decree for divorce, but the reasoning applies.)

[The King's Proctor's intervention on the ground of collusion is not limited to six months; but may be made at any time before decree absolute (Act of 1860, s. 7).]

Divorce for wife's adultery

1873. A husband is entitled, subject to the provisions of this Title, to obtain from the Court a

decree dissolving the marriage ('divorce'), if he proves to the satisfaction of the Court that his wife has, since the celebration of the marriage, been guilty of adultery.^(a) Adultery implies a voluntary act.^(b)

(a) Matrimonial Causes Act, 1857, ss. 27, 31.

(b) *Long v. Long* (1890) 15 P. D. 218. (But see *Hyman v. Hyman* [1904] P., at p. 407.)
Tarrow v. Tarrow [1892] P. 92.

[Before the passing of the Matrimonial Causes Act, 1857, the word 'divorce' was ambiguous. It might mean either (a) dissolution, effected by Act of Parliament, of a fully valid marriage, or (b) the annulment, by a decree of an ecclesiastical court, of a void or voidable marriage (divorce *a vinculo matrimonii*), or (c) separation by decree of an ecclesiastical court, which did not, however, dissolve the marriage (divorce *a mensâ et thoro*). Until 1857, no judicial tribunal had power to dissolve a valid marriage. Since the passing of the Act, the process corresponding to the old 'divorce *a mensâ et thoro*' has become known as a 'judicial separation'; and the term 'divorce' is now restricted to a dissolution of the marriage tie by decree or statute. By the Act of 1857, the matrimonial jurisdiction of the ecclesiastical courts was transferred to a new Court (the 'Court for Divorce and Matrimonial Causes'), which was absorbed into the High Court of Justice by the Judicature Act, 1873, s. 3.]

1874. A wife is entitled, subject to the provisions of this Title, to obtain from the Court a decree dissolving the marriage, if she proves to the satisfaction of the Court that her husband has, since the celebration of the marriage, been guilty of:—

*Wife's
right to
divorce*

- (i) incestuous adultery; or,
- (ii) bigamy with adultery; or,
- (iii) rape; or,
- (iv) sodomy or bestiality; or,

- (v) adultery coupled with such cruelty as without adultery would entitle her to a decree of judicial separation (*post*, § 1880); *or*,
- (vi) adultery coupled with desertion, without reasonable excuse, for two years or upwards,^(a) or coupled with desertion constituted by the fact of the husband having refused to comply with a decree of restitution of conjugal rights,^(b) whether the adultery was committed before or after the decree of restitution.^(c)

(a) Matrimonial Causes Act, 1857, ss. 27, 31.

(b) Matrimonial Causes Act, 1884, s. 5.

(c) *Bigwood v. Bigwood* (1888) 13 P. D. 89.
Beauclerk v. Beauclerk [1895] P. 220.

[‘Incestuous adultery’ is adultery committed by a husband with a woman with whom (even if his wife were dead) he could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity (Matrimonial Causes Act, 1857, s. 27; see *ante*, Sect. I, Tit. II, § 1855), and also, in spite of the Deceased Wife’s Sister’s Marriage Act, 1907, s. 1, adultery with a wife’s sister (Deceased Wife’s Sister’s Marriage Act, 1907, s. 3). A person commits ‘bigamy’ who, being already married, goes through the form of marriage with any other person during the life of his or her husband or wife, whether the second (so-called) marriage takes place within the Dominions of His Majesty or elsewhere (Matrimonial Causes Act, 1857, s. 27). ‘Cruelty’ may be defined as conduct involving ‘bodily hurt or injury to health or a reasonable apprehension of one or other of these’ (*Evans v. Evans* (1790) 1 Hagg. Con., at p. 39; *Tomkins v. Tomkins* (1858) 1 Sw. & Tr. 168; *Russell v. Russell* [1897] A. C. 395 (see especially *per* Lord Herschell, at p. 456). Thus, (i) menaces of violence (*Hulme v. Hulme* (1823) 2 Add. 27); (ii) the wilful communication of a venereal disease (*Brown v. Brown* (1865) 1 P. & D. 46), the *onus* of rebutting the presumption of knowledge being on the accused (*Browning v. Browning* [1911] P. 161);

(iii) systematic neglect and insult affecting the wife's health (*Kelly v. Kelly* (1870) L. R. 1 P. & M. 59; *Bethune v. Bethune* [1891] P. 205); (iv) causing of illness by the husband's conviction under the Criminal Law Amendment Act, 1885 (*Thompson v. Thompson* (1901) 85 L. T. 172), have been held to amount to cruelty. On the other hand, conduct, however improper, which does not cause physical injury or the apprehension thereof, does not amount to cruelty (*Russell v. Russell, ubi sup.*). 'Desertion' means cessation of cohabitation, whether actually effected by the guilty party or as the result of his misconduct. Thus, if a husband persistently commits adultery, his wife is justified in leaving him; and he will then be deemed guilty of desertion (*Sickert v. Sickert* [1899] P. 278). But, where a wife has obtained, under the Summary Jurisdiction (Married Women) Act, 1895 (*post*, § 1887)), and acted upon, an order absolving her from the duty of cohabiting with her husband, she cannot treat the consequent separation as 'desertion' by her husband for the purposes of this § (*Dodd v. Dodd* [1906] P. 189; *Harriman v. Harriman* [1909] P. 123).]

1875. A wife who has obtained a decree for judicial separation from her husband on the ground of his cruelty, may afterwards obtain a decree for dissolution of marriage on proof of her husband's subsequent adultery.

*Divorce
after judicial
separation*

Bland v. Bland (1866) L. R. 1 P. & M. 237.

Green v. Green (1873) L. R. 3 P. & M. 121.

[Presumably, the same principle will apply if the judicial separation had been obtained on any other ground, and even though the wife could have obtained a divorce in the first instance (*Green v. Green, ubi sup.*).]

1876. The Court must dismiss any petition for divorce if it finds that —

*Absolute
bars to
divorce*

- (i) the petitioner has, during the marriage, been accessory to or conniving at the

- adultery of the other party to the marriage; *or*,
- (ii) the petitioner has condoned the adultery complained of; *or*,
- (iii) the petition is presented or prosecuted in collusion with either of the respondents.

Matrimonial Causes Act, 1857, s. 30.

[The words 'with either of the respondents' are intended to cover the case of a husband's petition, in which the alleged adulterer must (except on special grounds) be made a co-respondent, and the case of a wife's petition, in which the alleged adulteress may be ordered to be made a respondent (Matrimonial Causes Act, 1857, s. 28). 'Condonation' means a complete forgiveness and blotting out of an offence known to the condoner to have been committed, followed by cohabitation. The fact that other offences had been committed by the guilty party, unknown to the condoner, is immaterial; but the condonation does not extend to them (*Bernstein v. Bernstein* [1893] P. 292). It seems now to be clearly established, that condonation is conditional upon the proper subsequent observance of the matrimonial relationship, and that a condoned offence is revived by any subsequent matrimonial misconduct. (*Houghton v. Houghton* [1903] P. 150; *Copsey v. Copsey* [1905] P. 94; *Price v. Price* [1911] P. 201). Condonation obtained by fraud is not an answer to a petition (*Roberts v. Roberts* (1917) 117 L. T. 157).]

Discretionary bars

1877. The Court is not bound to grant a decree for divorce if it finds that the petitioner has been guilty of: —

- (i) adultery during the marriage; *or*,
- (ii) unreasonable delay in presenting or prosecuting the petition; *or*,
- (iii) cruelty towards the other party to the marriage; *or*,
- (iv) having deserted or wilfully separated him-

self or herself from the other party before the adultery complained of, without reasonable excuse; or,

- (v) such wilful neglect or misconduct as has conduced to the adultery.

Matrimonial Causes Act, 1857, s. 31.

[The discretion vested in the Court by s. 31 of the Matrimonial Causes Act, 1857, is unfettered, though judicial (*Constantinidi v. Constantinidi* [1903] P., at p. 259; *Brooke v. Brooke* [1912] P. 205, n.); and no general rules on the subject can be laid down (*Wilkins v. Wilkins* [1918] P. 265). Perhaps the most common cases are those in which the adultery of the petitioner (especially a petitioning wife) has been caused, or at least induced, by the conduct of the respondent (*Symons v. Symons* [1897] P. 167; *Cleland v. Cleland* (1913) 109 L. T. 744). But condonation of the petitioner's offence by the respondent (*Woltereck v. Woltereck* [1912] P. 201; *Habra v. Habra* [1914] P. 100), the fact that, owing to a mistaken belief as to the circumstances, the petitioner was not aware that he was committing a matrimonial offence (*Joseph v. Joseph* (1865) 34 L. J. (P. & M.) 96), and the probable consequences of refusing a decree (*Pretty v. Pretty* [1911] P. 83), may, with all other relevant circumstances, be taken into account by the Court.]

1878. Every decree for divorce is in the first instance a decree *nisi*, not to be made absolute till after the expiration of six months from the pronouncing thereof, unless the Court fixes a shorter time, which must, however, not be less than three months. *Decree nisi for divorce*

Matrimonial Causes Act, 1860, s. 7.

Matrimonial Causes Act, 1866, s. 3.

Watton v. Watton (1866) L. R. 1 P. & M. 227. (The power of the Court to fix a time shorter than six months will only be exercised under very special circumstances (*Shelton v. Shelton* (1869) 38 L. J. (P. & M.) 34; *Fitzgerald v. Fitzgerald* (1874) L. R. 3 P. & M. 136 (period reduced); *Rippingall v. Rippingall* (1882) 48 L. T. 126).)

Q Q 3

*Refusal of
decree
absolute*

1879. Upon cause being shown to the Court by any person (including the King's Proctor) during the period between the pronouncing of the decree *nisi*, and the time when it can be made absolute, the Court may refuse to make absolute a decree *nisi* for divorce, on the ground of collusion, or on the ground that material facts have not been brought before the Court.

Matrimonial Causes Act, 1860, s. 7.

Brooke v. Brooke [1912] P. 136, 205 (n).

[*Semble*, The Court may in such circumstances refuse to make the decree absolute, even though, if the facts had been disclosed at first, they would not have prevented the Court from making a decree *nisi* in favour of the petitioner (*Brooke v. Brooke*, *ubi sup.*, at pp. 145, 146). In *Roche v. Roche* [1905] P. 142, it was held that the decree *nisi* must be rescinded if material facts have been withheld; but this decision was not followed in *Hunter v. Hunter* [1905] P. 217, in which case Gorell Barnes, P., expressed the opinion that "facts which are kept back are only material if, when disclosed, the Court would say that, knowing these facts, the Court would not allow the decree" (p. 228). This last opinion was, however, dissented from in *Brooke v. Brooke*; and in *Pretty v. Pretty* [1911] P. 83, the decree was made absolute, although the petitioner had falsely denied on oath that she had committed adultery. In addition to the power of showing cause mentioned above, the King's Proctor has a power to intervene during the progress of the cause, or at any time before the decree is made absolute, on the ground of collusion only (Matrimonial Causes Act, 1860, s. 7; *Brooke v. Brooke*, *ubi sup.*, at p. 141.)]

*Decree for
judicial sep-
aration*

1880. A husband or wife is entitled, subject to the provisions of this Title, to obtain from the Court a decree of judicial separation, if he or she proves, to the satisfaction of the Court, that the

other party has, since the celebration of the marriage, been guilty of: —

- (i) adultery; *or*,
- (ii) cruelty; *or*,
- (iii) desertion without reasonable cause for two years or upwards, or desertion constituted by the fact of the other party having refused to comply with a decree for restitution of conjugal rights; ^(a) *or*,
- (iv) *Semle*, sodomy or bestiality, or an attempt to commit either of these offences.^(b)

(a) Matrimonial Causes Act, 1857, s. 16.
Matrimonial Causes Act, 1884, s. 5.

[Where a wife refuses to allow marital rights, a husband is not guilty of desertion without reasonable cause, if he refuses to live with her (*Synge v. Synge* [1900] P. 180).]

(b) Matrimonial Causes Act, 1857, s. 7.
Bromley v. Bromley (1793) 2 Add. 158 n.
Mogg v. Mogg (1824) *ibid.* 292.

[The doubt in the text arises from the fact that the jurisdiction referred to in (iv) is conferred by the statute by reference to the practice of the old ecclesiastical courts, which practice is obscure, especially as to attempts.]

1881. The Court must dismiss any petition for judicial separation if it finds that the petitioner has: — *Absolute bars to judicial separation*

- (i) if judicial separation is sought on the ground of adultery, been accessory to or

connived at the adultery of the other party; *or*,

Boulting v. Boulting (1864) 3 Sw. & Tr. 329.

Ross v. Ross (1869) L. R. 1 P. & M. 734.

(ii) condoned the matrimonial offence complained of; *or*,

Durant v. Durant (1825) 1 Hagg. Eccl. 733.

(iii) presented or prosecuted the petition in collusion with the respondent; *or*,

Butler v. Butler (1890) 63 L. T. 256.

(iv) committed adultery during the marriage,^(a) unless such adultery has been condoned.^(b)

(a) *Drummond v. Drummond* (1861) 30 L. J. P. & M. 177.

Otway v. Otway (1888) 13 P. D. 141.

Gooch v. Gooch [1893] P. 99.

(b) *Anichini v. Anichini* (1839) 2 Curt. 210.

Seller v. Seller (1859) 1 Sw. & Tr. 482.

Gooch v. Gooch, *ubi sup.*, at pp. 105-6, *per* Jeune, P.

[The duty of the Court to refuse a decree of judicial separation on the above grounds is not directly imposed by statute, but arises from the statutory direction to follow the practice of the old ecclesiastical courts (Matrimonial Causes Act, 1857, ss. 7, 22). The curious result appears to be, that, whereas divorce can be granted although the petitioner has been guilty of adultery (see *ante*, § 1877, note), judicial separation cannot, at least unless the adultery has been condoned. For the effect of fresh misconduct, in reviving a condoned offence, see *ante*, § 1876 (note).]

Delay in
petition for
judicial sep-
aration

1882. Delay in presenting a petition for judicial separation is not a ground for dismissing such petition.^(a) But lapse of time may be evidence that the suit is not brought *bonâ fide* for the protection of the

NULLITY, DIVORCE, AND SEPARATION 1195

petitioner, but for some collateral purpose; in which case the petition will be dismissed.^(b)

(a) *Cooke v. Cooke* (1863) 3 Sw. & Tr. 246.

(b) *Matthews v. Matthews* (1859) 1 Sw. & Tr. 499; 3 Sw. & Tr. 161.

[The above two cases, which appear to be the only ones on the point, were cases of cruelty.]

1883. When a petition for judicial separation is presented on the ground of adultery, the fact that the petitioner has been guilty of cruelty^(a) or desertion^(b) is not a ground for dismissing the petition; unless such cruelty or desertion has conduced to the adultery.^(c) But (*semble*) this rule does not apply if the petition is presented on some other ground.^(d)

(a) *Dillon v. Dillon* (1841) 3 Curt. 86.

(b) *Morgan v. Morgan* (1841) 2 Curt. 679.

Duplany v. Duplany [1892] P. 53.

Synge v. Synge [1900] P., at p. 195, *per* Jeune, P.

(c) *Boreham v. Boreham* (1866) L. R. 1 P. & M. 77.

Hodgson v. Hodgson [1905] P. 233.

(d) No authority can be found for this statement; but it is believed to represent the practice of the Court. *Quære*: whether the Court is bound to refuse a decree in such cases.

1884. When a petition for judicial separation is presented on the ground of adultery, the Court may refuse a decree, if it finds that the petitioner has been guilty of conduct conducing to the adultery.

Boreham v. Boreham (1866) L. R. 1 P. & M. 77.

Hodgson v. Hodgson [1905] P. 233.

*Marriage of
divorced
persons*

1885. After a decree absolute for the dissolution of marriage, either party may marry again; ^(a) but a man may not, during his divorced wife's lifetime, marry her sister. ^(b) The decree also places the wife in the position of an unmarried woman in respect of property, contract, tort, and capacity to sue and be sued, ^(c) and relieves the husband from liability for torts committed by the wife, whether before or after the decree. ^(d)

(a) Matrimonial Causes Act, 1857, s. 57.

[Where there is a right of appeal from the decree, the right to remarry does not arise until the time for appealing has expired, or the appeal has been dismissed (*ibid.*; and Divorce Amendment Act, 1868, s. 4).]

(b) Deceased Wife's Sister's Marriage Act, 1907, s. 3 (2).

(c) *Prole v. Soady* (1868) L. R. 3 Ch. App. 220.
Thornley v. Thornley [1893] 2 Ch. 229.

[In general the wife's status is changed only as from the date of the decree absolute (*Norman v. Villars* (1877) 2 Ex. D. 359; *Sinclair v. Fell* [1913] 1 Ch. 155). But in *Prole v. Soady*, *ubi sup.*, it was held that the husband's act in reducing the wife's *chose in action* into possession after the decree *nisi*, was ineffectual.]

(d) *Capell v. Powell* (1864) 17 C. B. N. S. 743.

*Effects of
judicial sep-
aration*

1886. The effect of a decree of judicial separation is to relieve the parties from the duty of cohabitation, ^(a) and to place the wife, as from the date of the decree, in the position of an unmarried woman with respect to property of every description which she may acquire or which may devolve on her after such decree, ^(b) whether in her own right or as personal

representative or trustee,^(c) and for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding. And her husband is not liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur; except that when, upon a judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he is liable for necessities supplied for her use.^(d)

(a) Matrimonial Causes Act, 1857, s. 16.

(b) *Ibid.*, s. 25. (Since the effect of judicial separation is limited to property acquired after the decree, it does not remove a restraint on anticipation attaching to property acquired before (*Waite v. Morland* (1888) 38 Ch. D. 135).)

(c) Matrimonial Causes Act, 1858, s. 7.

(d) Matrimonial Causes Act, 1857, s. 26.

[The husband cannot, after the judicial separation, be made liable for the wife's torts previously committed, even though an action for that purpose was commenced before the decree was pronounced (*Cuenod v. Leslie* [1909] 1 K. B. 880).]

1887. A wife may obtain from a court of summary jurisdiction an order providing that she be no longer bound to cohabit with her husband, in the following cases:—

*Separation
order*

- (i) if her husband has been summarily convicted of an aggravated assault upon her within the meaning of the Offences against the Person Act, 1861, s. 43; or,

- (ii) if her husband has been convicted on indictment of an assault upon her, and sentenced to pay a fine of more than five pounds, or to a term of imprisonment of more than two months; *or*,
- (iii) if her husband has deserted her; *or*,
- (iv) if her husband has been guilty of persistent cruelty to her, or has been guilty of wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and by such cruelty or neglect has caused her to leave, and live separately from him.

Such an order, while in force, has the effect in all respects of a decree of judicial separation on the ground of cruelty.)

Summary Jurisdiction (Married Women) Act, 1895, ss. 4, 5 (a).

[No order can be made in favour of a married woman who has committed adultery (*ibid.*, s. 6); and any order will be discharged on proof that the woman has voluntarily resumed cohabitation with her husband, or has committed adultery (*ibid.*, s. 7). The order may also be varied on the application of either party and the production of fresh evidence (*ibid.*).]

*Weekly
allowance*

1888. The Court may also, in the circumstances referred to in § 1887, order that the husband shall pay to the wife personally, or for her use, such weekly sum, not exceeding two pounds, as it shall,

having regard to the means of both parties, consider reasonable.

Ibid., s. 5 (c).

[The amount may be varied on the application of either party, and the production of fresh evidence (*ibid.*, s. 7).]

1889. A wife deserted by her husband may apply to a court of summary jurisdiction for an order called a 'protection order'; and the Court may grant such order if satisfied that the wife has been deserted without reasonable cause, and that she is maintaining herself by her own industry or property. The effect of such order is to protect all earnings and property of the wife, acquired since the desertion, from the husband, and all creditors of the husband, and persons claiming under him; and the wife is, during the continuance of the order, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would have been if she had obtained a decree of judicial separation.

Matrimonial Causes Act, 1857, s. 21. (See also Matrimonial Causes Act, 1858, ss. 6-10; Matrimonial Causes Act, 1864, s. 1.) The husband, his creditors, and persons claiming under him, may apply for the discharge of the order (Matrimonial Causes Act, 1857, s. 21; 1864, s. 1.)

[A protection order does not remove a restraint on anticipation attaching to property of the wife acquired before the date of the desertion (*Hill v. Cooper* [1893] 2 Q. B. 85).]

1890. On a decree for divorce or nullity of marriage, the Court may order that the husband shall, to

Maintenance on divorce or nullity

the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reasonable; and may, if it thinks fit (in addition or in the alternative), order that the husband shall pay to the wife during their joint lives such monthly or weekly sum for her maintenance and support, as the Court may think reasonable.^(a) In case of a decree for divorce, an order may be made even in favour of a guilty wife.^(b)

(a) Matrimonial Causes Act, 1907, s. 1, (repealing s. 32 of the M. C. A. 1857, and s. 1 of the M. C. A. 1866) which contains provisions for discharging, modifying, or reviving such order for payment of monthly or weekly sums, or for increasing their amount.

(b) *Bent v. Bent* (1861) 2 Sw. & Tr. 392.

Robertson v. Robertson (1883) 8 P. D. 94.

Edwards v. Edwards [1894] P. 33.

Asbcroft v. Asbcroft [1902] P. 270.

Squire v. Squire [1905] P. 4.

[The order is sometimes made conditional on the wife remaining unmarried (*Smith v. Smith* [1898] P. 29) or unmarried and chaste (*Kettlewell v. Kettlewell* [1898] P. 138; *Squire v. Squire, ubi sup.*). Interim orders for payment of alimony can be made during the pendency of the suit (Matrimonial Causes Act, 1907, s. 1 (3); *Foden v. Foden* [1894] P. 307); but only where the wife has no other sufficient means of support (*Bass v. Bass* [1915] P. 17). There is no power under the statute for the Court, without the consent of the husband, to order payment of maintenance by him during the life of the wife (*Maidlow v. Maidlow* [1914] P. 245).]

*Alimony on
restitution
or judicial
separation*

1891. When a decree for restitution of conjugal rights or for judicial separation is made, the Court

NULLITY, DIVORCE, AND SEPARATION 1201

may order the husband to pay until further order a periodical sum to his wife by way of maintenance or alimony;^(a) even if the decree is made in consequence of the wife's misconduct.^(b) Not more than one half of the joint income of husband and wife can be allotted as alimony.^(c)

- (a) Matrimonial Causes Act, 1857, s. 17; 1884, s. 2.
Leslie v. Leslie [1911] P. 203.
Tangye v. Tangye [1914] P., at p. 208, *per* Evans, P.
- (b) *Prichard v. Prichard* (1864) 3 Sw. & Tr. 524.
Goodden v. Goodden [1892] P. 1.
- (c) *Haigh v. Haigh* (1869) L. R. 1 P. & M. 709. (Where the wife has not to support children of the marriage, the amount will usually be one third of the joint income (*Cobb v. Cobb* [1900] P. 294).)

[Interim orders for payment of alimony to the wife *pendente lite* can be made during the suit; and such alimony may even be continued during the pendency of an appeal by a wife whose petition has been dismissed (*Jones v. Jones* (1872) L. R. 2 P. & M. 333).]

1892. The Court may make an order increasing, diminishing, or taking away, the amount payable as maintenance or alimony, under a decree for restitution of conjugal rights,^(a) or for judicial separation; ^{Variation of alimony} ^(b) if it appears that the means of the husband have increased or diminished respectively, or the wife has been guilty of misconduct.^(c)

- (a) Matrimonial Causes Act, 1884, s. 4.
Cox v. Cox (1826) 3 Add. 276.
- (b) *Saunders v. Saunders* (1858) 1 Sw. & Tr. 72.
Louis v. Louis (1866) L. R. 1 P. & M. 230.
Tangye v. Tangye [1914] P., at p. 208, *per* Evans, P.
- (c) *Wickins v. Wickins* [1918] P. 265.

1893. When a husband has obtained a decree for divorce or judicial separation by reason of his wife's ^{Settlement of guilty wife's property}

adultery, the Court may order such settlement as it thinks proper to be made of any property (whether in possession or reversion) to which the wife is entitled, for the benefit of the innocent party, and of the children of the marriage, or either or any of them.

Matrimonial Causes Act, 1857, s. 45.

[Such settlement is valid notwithstanding the coverture of the wife (Matrimonial Causes Act, 1860, s. 6).]

Variation of settlements

1894. When a final decree of divorce or of nullity of marriage is made, the Court may make such order as to the Court shall seem fit with regard to the application, either for the benefit of the children of the marriage or of the parties to the marriage, of property comprised in any ante-nuptial or post-nuptial settlement made on the parties to the marriage.

Matrimonial Causes Act, 1859, s. 5.

Matrimonial Causes Act, 1878, s. 3 (which provides that an order may be made even though there are no children of the marriage).

[Where a wife who had been divorced was still allowed to retain an income under a settlement of her husband's property, the allowance was made subject to a *dum sola et casta* clause (*Ollier v. Ollier* [1914] P. 240).]

Damages against co-respondent

1895. A husband may recover damages (to be ascertained by the verdict of a jury) from any person who has committed adultery with his wife; and

NULLITY, DIVORCE, AND SEPARATION 1203

the Court may direct in what manner such damages shall be paid and applied, and may direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife.

Matrimonial Causes Act, 1857, s. 33.

[The claim for such damages may be combined with a petition for dissolution of the marriage, as is usually the case, or with a petition for judicial separation (see *Mason v. Mason* (1882) 7 P. D. 233, (1883) 8 P. D. 21), or may form the subject of a petition by itself (*Cox v. Cox and Warde* [1906] P. 267). The principles upon which damages should be assessed are, despite the wording of s. 33, the subject of much difference of opinion (see *Butterworth v. Butterworth* [1920] P. 126; *Burne v. Burne* [1920] P. 17); and no precise rules can be laid down. It is not usual to award damages or costs against a co-respondent who had no reason to believe, when he committed the adultery, that the co-respondent was a married woman. But there is no hard and fast rule to that effect (*Burne v. Burne, ubi sup.*; *Langrick v. Langrick* [1920] P. 90).]

1896. A claim for such damages as are specified *When damages not recoverable* in the last preceding § will be refused on any ground on which a decree for dissolution of the marriage would be refused (*ante*, §§ 1876-1879).

Bernstein v. Bernstein [1893] P. 292.
Cox v. Cox and Warde, ubi sup.

1897. The jurisdiction of the Court to entertain *Jurisdiction of the Court* a petition for divorce is limited to cases where the

parties are domiciled in England.^(a) In cases of petitions for judicial separation or restitution of conjugal rights, and in applications for alimony, it is sufficient if the parties are resident in England at the commencement of the proceedings.^(b) In cases of petition for nullity, it is sufficient that the alleged marriage was celebrated in England,^(c) or that the respondent is resident in England.^(d)

- (a) *Shaw v. Gould* (1868) L. R. 3 H. L. 55.
Wilson v. Wilson (1872) L. R. 2 P. & M. 435.
Le Mesurier v. Le Mesurier [1895] A. C. 517 (P. C.).
Bater v. Bater [1906] P. 209.
Ogden v. Ogden [1908] P., at p. 80.

[*Niboyet v. Niboyet* (1878) 4 P. D. 1, must be regarded as overruled on this point. It is not necessary that the co-respondent should be domiciled or even reside in England, or be a British subject (*Rayment v. Rayment* [1910] P. 271).]

- (b) *Le Mesurier v. Le Mesurier*, *ubi sup.*, at p. 531, *per Curiam*.
Armytage v. Armytage [1898] P. 178.
De Gasquet James v. D. of Mecklenburg-Schwerin [1914] P. 53.
Perrin v. Perrin [1914] P. 135.
- (c) *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67.
Ogden v. Ogden [1908] P., at p. 80, *per Curiam*.
- (d) *Roberts v. Brennan* [1902] P. 143.

[Where a marriage, celebrated in England, has been declared void, at the request of the husband, or his parents, by the Court of a foreign country in which the husband is domiciled, and the wife's domicile at the date of the marriage was English, the English Court has jurisdiction to entertain a petition for divorce by the wife (*Stathatos v. Stathatos* [1913] P. 46; *De Montaigu v. De Montaigu* [1913] P. 154). *Seem*, also, a husband cannot, by abandoning his English domicile at the time of deserting his wife, prevent the Court entertaining a petition by her for divorce (*Niboyet v. Niboyet* (1878) 4 P. D., at p. 14, *per Brett, L. J.*; *Armytage v. Armytage* [1898] P., at p. 185, *per Gorell Barnes, P.*).]

SECTION II

RELATIONS OF CHILDREN, PARENTS, AND GUARDIANS

TITLE I—LEGITIMACY

1898. A person is legitimate who is the child of parents between whom the relation of marriage existed, either at the time when he was begotten, or at the time when he was born, or at any intervening time. *General rule*

Co. Litt. 7 b.

Bl. Comm. I. 434.

Birtwhistle v. Vardill (1840) 6 Bing. N. C. 385.

Gardner v. Gardner (1877) L. R. 2 App. Ca. 723.

1899. The marriage of the parents of a person born before such marriage does not render such person legitimate, if, at the date of his birth, or at the date of the marriage, the father was domiciled in England. *Legitimation by subsequent marriage*

20 Hen. III (1235) c. 9 (Statute of Merton).

Re Wright's Trusts (1856) 2 K. & J. 595.

Re Grove (1888) 40 Ch. D. 216.

[No means short of an Act of Parliament will make such a person legitimate.]

*Rule of
father's
domicile*

1900. The marriage of the parents of a person born before such marriage renders such person legitimate, if the father was, both at the date of the birth and at the date of the marriage, domiciled in a country in which the marriage has, according to the law of that country, the effect of rendering such person legitimate.^(a) But a person who is legitimate only by reason of the provisions of this § is not entitled to succeed as heir, or heir of the body, to any real estate in England; ^(b) nor can any ascendant or collateral relation of his succeed as his heir to real estate in England.^(c)

- (a) *Munro v. Munro* (1840) 7 Cl. & F. 842.
Re Goodman's Trusts (1881) 17 Ch. D. 266.
Re Grove, 40 Ch. D. 216.

[Presumably, a similar rule would apply if the law of the father's domicile treated such child as legitimate on any other ground (*Re Goodman's Trusts*, *ubi sup.*, at p. 297, *per James*, L. J.).]

- (b) *Birtwhistle v. Vardill* (1835) 2 Cl. & F. 571; (1840) 7 Cl. & F. 895.

[By parity of reasoning, if he were dead, descent could not be traced through him.]

- (c) *Re Don's Estate* (1857) 4 Drew. 194.

[*Quære*: whether a person so legitimated can succeed on intestacy to leaseholds in England (see Dicey, *Conflict of Laws*, 2nd edn., p. 489).]

*Presumption
of legitimacy*

1901. The child of any woman is presumed to be the child of any man to whom she was married at any such time as is mentioned in § 1898, *ante*.

Banbury Peerage Case (1811) 1 S. & S. 153.

Gardner v. Gardner (1877) L. R. 2 App. Ca. 723.

[It is said by Coke (Co. Litt. 8 a) that when a widow remarries soon after the death of her first husband, and the child is born at such a time that he might have been the child of either husband, he may on coming to years of discretion choose which shall be considered his father.]

1902. The presumption stated in § 1901 may be rebutted by proof that, at any time when the child could have been begotten, (i) the father was absent from England,^(a) or (ii) he was impotent,^(b) or (iii) the parents had no opportunity of sexual intercourse,^(c) or (iv) it is highly improbable that such intercourse took place.^(d) But direct evidence of the husband or wife that such intercourse did not take place during the marriage is not admissible to rebut the presumption.^(e) *Proof of non-access*

(a) Co. Litt. 244.

[Presumably it is implied that the mother remained in England.]

(b) *Banbury Peerage Case* (1811) 1 S. & S. 153.

(c) *Hawes v. Draeger* (1883) 23 Ch. D. 173.

Burnaby v. Baillie (1889) 42 Ch. D. 482.

(d) *Morris v. Davies* (1836) 5 Cl. & F. 163.

Bosville v. A.-G. (1887) 12 P. D. 177.

Poulett Peerage Case [1903] A. C. 395.

(e) *R. v. Sourton* (1836) 5 A. & E. 180.

Aylesford Peerage Case (1885) L. R. 11 App. Ca., at p. 9, *per* Lord Selborne.

Burnaby v. Baillie (1889) 42 Ch. D., at p. 294.

[The last rule does not apply to evidence as to intercourse before marriage (*Poulett Peerage Case*, *ubi sup.*).]

*Period of
gestation*

1903. The duration of the period of gestation is a question of fact in each case.

Alsop v. Bowtrell (1619) Cro. Jac. 541.

Bosville v. A.-G. (1887) 12 P. D. 177.

Burnaby v. Baillie (1889) 42 Ch. D. 482.

*Declaration
of legitimacy*

1904. Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on his legitimacy or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal property situate in England, may petition the Court for a decree declaring all or any of the following matters: —

- (i) that the petitioner is the legitimate child of his parents;
- (ii) that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage;
- (iii) that the petitioner's marriage is a valid marriage.

Any decree made by the Court on such petition (whether for or against such legitimacy or validity), is binding on the Crown and on all other persons; except that —

- (i) it does not prejudice any person unless such person has been cited or made a party to the proceedings, or is the heir at law or next of kin or other real or personal repre-

sentative of a person so cited or made a party, or derives title under or through such person ;

- (ii) it does not prejudice any person if it is subsequently proved to have been obtained by fraud or collusion.

Legitimacy Declaration Act, 1858, ss. 1, 8.

[A copy of every petition must be served upon the Attorney-General, who thereupon becomes a respondent (*ibid.*, s. 6).]

TITLE II — DUTIES OF MAINTENANCE AND EDUCATION

*Maintenance
of children
and grand-
children*

1905. Subject to § 1908, the father, mother, grandfather, and grandmother, of any person are bound to provide, so far as they are able, necessary maintenance for such person.

Poor Relief Act, 1601, s. 7.

*Maintenance
of wife's
children*

1906. Subject to § 1908, the husband of any woman is bound to provide necessary maintenance for her children (whether legitimate or illegitimate) born before his marriage to such woman, until they attain the age of sixteen years, or until the death of the mother, whichever first happens.

Poor Law Amendment Act, 1834, s. 57.

[But not for her grandchildren (*Draper v. Glenfield* (1631) 2 Bulstr. 345); unless he acquired property by marriage with the woman (*Westminster v. Gerrard* (1632) *ibid.*, 346).]

*Maintenance
of parents*

1907. Subject to § 1908, every person is bound to provide necessary maintenance for his father and mother.

Poor Relief Act, 1601, s. 7.

[The liabilities of maintenance imposed by §§ 1905-7 cannot be directly enforced by civil action; but a failure to discharge

them, which leaves the persons who ought to be provided for, chargeable to the Poor Law authorities, may be punished summarily (Vagrancy Act, 1824, s. 3). And the Poor Law authorities have power to seize the property of any father or mother liable under § 1905, in order to defray the cost of relief provided for the children by them (Poor Relief Act, 1718, s. 1).]

1908. The provisions of §§ 1905-7 impose no *Limits of liability.* liability on any person to provide maintenance who is not able to do so out of his own property or by means of his labour; nor do they impose any liability in favour of any person who is able to maintain himself.

Poor Relief Act, 1601, s. 7.

[The words in the Act referring to the persons liable are: 'being of sufficient ability.' As to the interpretation of these words, see *Coulson v. Davidson* (1907) 96 L. T. 20.]

1909. The provisions of §§ 1905-7 impose no *Liability of married woman* liability on any married woman; ^(a) except that: —

- (i) if poor relief is given to the children of any woman whose husband is beyond the seas, or in custody of the law, or confined in a licensed house or asylum as a lunatic or idiot,^(b) or who is living separate from her husband,^(c) it is to be given upon the same conditions as if she were a widow;
- (ii) a married woman having separate estate is subject to the same liability for the main-

tenance of her children and grandchildren as her husband is subject to for the maintenance of her children or grandchildren (*ante*, § 1906),^(d) and is liable to provide maintenance for her parents, in the same manner as if she were unmarried.^(e)

- (a) *Custodes v. Ginkes* (1651) Style, 283.
Coleman v. Birmingham (1881) 6 Q. B. D. 615.
- (b) Poor Law Amendment Act, 1844, s. 25.
- (c) Divided Parishes and Poor Law Amendment Act, 1876, s. 18.

[Of course, a widow is liable as a 'mother' under s. 6 of the Act of 1601 (see *ante*, § 1905).]

- (d) Married Women's Property Act, 1882, s. 21. (But this provision does not relieve the husband of his liability to maintain her children and grandchildren.)
- (e) Married Women's Property Act, 1908, s. 1.

[The liability of the married woman is not expressly limited by the Acts to her separate estate. *Quære*: as to the proper construction.]

*Maintenance
of illegiti-
mate chil-
dren*

1910. The provisions of §§ 1905-7 do not (except where expressly mentioned) impose any liability to provide maintenance for illegitimate children or grandchildren.^(a) But the mother of an illegitimate child is bound to provide necessary maintenance for such child till it attains the age of sixteen, or, being a female, marries under that age;^(b) and the father of an illegitimate child may be compelled to make a contribution (not exceeding ten shillings a week) to the mother or other person having custody of the child, for the purpose of maintain-

ing of such child until the child attains the age of thirteen.^(c) (*Semble*) this liability exists, even though the child was born out of the jurisdiction; unless it is proved that the status of the child is governed by foreign law.^(d)

(a) *Westminster v. Gerrard* (1632) 2 Bulstr. 346.

[But see *R. v. Reeve* (1631) *ibid.*, 344.]

(b) Poor Law Amendment Act, 1834, s. 71: Married Women's Property Act, 1882, s. 21.

(c) Bastardy Laws Amendment Act, 1872, ss. 4, 5.

Bastardy Laws Amendment Act, 1873, s. 5.

Divided Parishes and Poor Law Amendment Act, 1876, s. 24.

Affiliation Orders Act, 1914, s. 3; 1918, s. 1.

(d) *R. v. Humphreys* [1914] 3 K. B. 1237.

[The application for compelling such contribution must be made to the Justices of the Peace at Petty Sessions; and the evidence of the mother as to the paternity requires corroboration in some material particular (*Cole v. Manning* (1877) 2 Q. B. D. 611). In some cases the Justices may order the contribution to continue until the child attains the age of sixteen (Bastardy Laws Amendment Act, 1872, s. 5); and the payments are not, as a rule, now to be made directly to the mother or person having custody of the child, but to a collector appointed by the Court (Affiliation Orders Act, 1914, s. 1). An affiliation order cannot be enforced against the estate of a deceased putative father (*Re Harrington* [1908] 2 Ch. 687).]

1911. It is the duty of the parent, guardian, and every person who is liable to maintain, or has the custody of, any child between the ages of five and fourteen years, to cause it to receive efficient elementary instruction in reading, writing, and arithmetic.

*Liability for
education of
children*

Education Act, 1870, s. 3.

Education Act, 1876, ss. 4, 48.

[This duty cannot be made the subject of civil proceedings. But if, in the case of a child over the age of five years, the duty is neglected habitually or without reasonable excuse, the local education authority must take proceedings to obtain from a court of summary jurisdiction an order for the child to attend 'some certified efficient school' ('attendance order'), which will be enforced by means of a fine (Education Act, 1876, s. 11; Education (Administrative Provisions) Act, 1907, s. 14). In the case of a blind, deaf, or defective or epileptic child, the period of compulsory education extends to sixteen years (Elementary Education (Blind and Deaf Children) Act, 1893, s. 11; Elementary Education (Defective and Epileptic Children) Act, 1899, s. 11); and the Board of Education may, on the application of a local authority, authorize the instruction of children in public elementary schools till the end of the school term in which they reach the age of sixteen (Education Act, 1918, s. 8 (5)), while the local authority may raise the age of compulsory attendance to fifteen (*ibid.*, s. 8 (2)). The children of neglectful, drunken, and criminal parents may be sent by the Court to a certified industrial school (Children Act, 1908, s. 58 (1)); and parents, or other persons liable for the maintenance of such children must, if they are able, contribute to their maintenance therein (*ibid.*, s. 75 (1)).]

NOTE

It will be observed that English law imposes no directly enforceable duty to provide more than the bare necessities of life, and mere elementary education, for children (cf. *Wellesley v. Beaufort* (1827) 2 Russ., at p. 23). The duty of a father to provide such further maintenance and education for his children as may be suitable to their station in life is, however, recognized, in the sense that the Court will not order the property of an infant to be applied for his maintenance and education in exoneration of the father, when the father has sufficient means to make suitable provision (*Andrews v. Partington* (1790) 2 Cox, Eq. 223; *Re Allan* (1881) 17 Ch. D. 807). The mother, whether during the life or after the death of the father, is not regarded as being under a similar obligation (*Haley v. Bannister* (1819) 4 Madd. 275; *Douglas v. Andrews* (1849) 12 Beav. 310).

TITLE III — CUSTODY AND GUARDIANSHIP OF MINORS

1912. Subject to the provisions of this Title, the father of a minor is the sole legal guardian of such minor. *Father as guardian*

Ex parte Hopkins (1732) 3 P. Wms., at p. 154, *per* Lord King, C.
Wellesley v. Beaufort (1827) 2 Russ. 21; 2 Bligh (N. S.) 124.
Re Agar Ellis (1883) 24 Ch. D. 317.

[*Quære*: Does this right exist in the case of a married daughter?]

1913. After the death of the father of a minor, the mother is entitled to the custody of such minor,^(a) and is guardian of such child jointly with any guardian appointed by the father by deed or will, or with any guardian appointed by the Court in default of a guardian appointed by the father.^(b) *Mother as guardian*

- (a) *Villareal v. Mellish* (1737) 2 Swans. 533.
Mendes v. Mendes (1748) 3 Atk., at p. 624.
R. v. Clarke (1857) 7 E. & B. 186.

[As to the extent of this custody, see *post*, §§ 1932–1936.]

- (b) Guardianship of Infants Act, 1886, s. 2. (Before this Act the mother's right of custody was subject to the power of any guardian appointed by the father (*Talbot v. Shrewsbury* (1840) 4 My. & Cr. 672).)

R R

*Illegitimate
child*

1914. The mother of an illegitimate minor is *primâ facie* entitled to the custody of such minor.

R. v. Nash (1883) 10 Q. B. D. 454.

Barnardo v. McHugh [1891] A. C. 388.

Humphreys v. Polak [1901] 2 K. B. 385.

R. v. New (1904) XX T. L. R. 583.

[The rights of the mother of an illegitimate child are said to be not identical with those of the father of a legitimate child (*Barnardo v. McHugh*, *ubi sup.*, at p. 394).]

*Reputed
father*

1915. After the death of the mother, the reputed father is *primâ facie* entitled to the custody of an illegitimate minor.

Ord v. Blackett (1725) 9 Mod. 116.

In re Kerr (1889) 24 L. R. (Ir.) 59.

[The Court has even, after the death of the reputed father of an illegitimate minor, appointed persons nominated in his testament as guardians of the minor (*Ward v. St. Paul* (1789) 2 Bro. C. C. 583; *Peckham v. Peckham* (1788) *ibid.*, p. 584 n.).]

*Agreements
as to custody
of minors*

1916. No agreement by which a father of a minor,^(a) or the mother of an illegitimate minor,^(b) agrees to give up, or not to resume, the guardianship, custody, or control of such minor, is binding; except an agreement contained in a separation deed to the effect that the father shall give up such custody or control to the mother. And such last mentioned agreement will not be enforced by the Court, if the Court is of opinion that it will not be for the minor's benefit to enforce it.^(c)

CUSTODY AND GUARDIANSHIP. 1217

- (a) *Reg. v. Smith* (1853) 22 L. J. (Q. B.) 116.
Andrews v. Salt (1873) L. R. 8 Ch. App. 622.
R. v. Barnardo (1889) 23 Q. B. D. 305.
- (b) *Humphreys v. Polak* [1901] 2 K. B. 385.
- (c) Custody of Infants Act, 1873, s. 2.

[Any condition having the object of depriving a parent of the custody of a child is void (*Re Sandbrook* [1912] 2 Ch. 471). But this rule does not render invalid a provision in a settlement by a third party that maintenance out of the income of the settled fund shall not be allowed to a child whilst he is in the custody or control of his father (*Re Borwick's Settlement* [1916] 2 Ch. 304).]

1917. The Court may, on the application of the mother of a minor, make such order as it may think fit with regard to the custody of such minor, and the access thereto of either parent, having regard to the welfare of the minor and to the conduct and wishes of either parent. Custody during father's lifetime

Guardianship of Infants Act, 1886, s. 5.
Re A. and B. [1897] 1 Ch. 786.

1918. If a minor is entitled by inheritance^(a) to the legal estate^(b) in any land of socage tenure, his nearest blood relation to whom the land cannot descend is his guardian in socage until such minor attains the age of fourteen years,^(c) or, if the land is subject to the custom of gavelkind, until the minor attains the age of fifteen years.^(d) The powers of such guardian are displaced by the existence of any guardian appointed by the deed or will of the father or mother.^(e) Guardian in socage

- (a) *Quadring v. Downs* (1677) 2 Mod. 176.
- (b) *R. v. Toddington* (1818) 1 B. & Ald. 560.
- (c) Litt. s. 123.
 Bac. Ab. *Guardian*, A. 1.
Bedell v. Constable (1669) Vaugh. 177.
- (d) *Lambarde, Perambulation of Kent* (ed. 1596) p. 563.
- (e) 12 Car. II (1660) c. 24, s. 8.
 Guardianship of Infants Act, 1886, ss. 3, 4.

R R 2

[It is said that a minor having socage lands may, after attaining the age of fourteen, elect a guardian for himself, if there is no other guardian, and that in certain cases even a minor under the age of fourteen may make such an election (Co. Litt. 88; *Ex parte Edwards* (1747) 3 Atk. 519; *Anon.* (1751) 2 Ves. Sen. 374, *per* Lord Hardwicke, C.). But the law on this point is practically obsolete; for such a guardian, even if appointed, will not oust the jurisdiction of the Court to appoint a guardian (*Ex parte Watkins* (1752) 2 Ves. Sen. 470; *Curtis v. Rippon* (1819) 4 Madd. 462). Equally obsolete is the law relating to 'guardianship by nature,' which was said to belong to the father in respect of his heir apparent or heiress presumptive, and 'guardianship for nurture,' which was said to belong to the father and, after his death, to the mother in respect of any child, and to last till such child attained the age of fourteen (see Co. Litt. 88 b; *Ratcliff's Case* (1592) 3 Rep. 37 b). These last mentioned forms of guardianship may now be regarded as merged in the parental right of custody and control (*Re Agar-Ellis* (1883) 24 Ch. D. 317). There may also be, or might formerly have been, a guardian by local custom of infant tenants of copyhold land (*Egleton's Case* (1599) 2 Roll. Ab. 40; *Church v. Cudmore* (1691) 2 Lutw. 1181); or of infants whose fathers died in certain cities or boroughs (12 Car. II (1660) c. 24, s. 10; *Wilkinson v. Boulton* (1665) 1 Lev. 162; *Frederick v. Frederick* (1721) 1 P. Wms. 710).]

*Statute
of 1660*

1919. The father of a child may by deed or will appoint a guardian or guardians for such child, to act after the father's death during such time as the child is a minor, if the child is unmarried at the death of the father.

12 Car. II (1660) c. 24, s. 8.

[The marriage of a male minor after the death of the father does not put an end to the guardianship (*Eyre v. Shaftesbury* (1723) 2 P. Wms. 102; *Roach v. Garran* (1748) 1 Ves. Sen. 157, 159). It is said that the marriage of a female minor puts an end to the guardianship (*Mendes v. Mendes* (1747) 1 Ves. Sen. at p. 91; but see *Re Sampson and Wall* (1884) 25 Ch. D., at p. 491). *Semble*, the statute refers to legitimate relationship only. In the case of an appointment by will of a soldier on active service or a mariner at sea, the provisions of § 1965, *post*, apply (Wills (Soldiers and Sailors) Act, 1918, s. 4).]

1920. The mother of a minor may appoint by deed or will a guardian or guardians for such minor, to act after the death of the father and mother, if the child is unmarried at that date, but jointly with any guardian appointed by the father. *Statute of 1886*

Guardianship of Infants Act, 1886, s. 3 (i).

[Before the Act of 1886, it was held that a mother had no power to appoint a guardian by will (*Ex parte Edwards* (1747) 3 Atk. 519). *Semle*, the Act of 1886 refers to legitimate relationship only.]

1921. The mother of a minor may provisionally nominate by deed or will a guardian or guardians to act jointly with the father. And the Court may, after her death, if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, confirm the appointment; and such guardian or guardians will thereupon be authorized and empowered so to act. Or the Court may make such other order in respect of the guardianship as it shall think right. *Provisional nomination by mother*

Guardianship of Infants Act, 1886, s. 3 (2).

1922. The Court has power to appoint a guardian for any minor, whether such minor is entitled to property or not. *Appointment by Court*

Re Spence (1847) 2 Ph. 247.

Hope v. Hope (1854) 4 De G. M. & G., at p. 344, *per* Cranworth, C.

Re McGrath [1893] 1 Ch. 143.

[The court does not however commonly appoint a guardian in the absence of any property to which the infant is entitled; because

in such a case the court cannot provide a scheme for the infant's maintenance and education (*Re McGrath, ubi sup.*, at p. 147). Nor, *semble*, will the Court appoint a guardian if a proper guardian appointed by the father or mother is in existence, or, *à fortiori*, if the father himself is a proper person and able to act. For the special statutory power of the Court to appoint a guardian to act with the mother where there is no fit guardian appointed by the father, see *ante*, § 1913.]

*Removal of
custody from
guardian*

1923. The Court has power to take away the custody and control of a minor from any guardian or person (including the father) and to commit such control and custody to some other person, when such a course is for the benefit of the minor,^(a) even though the guardian has not been guilty of misconduct.^(b)

(a) *Shelley v. Westbrook* (1817) Jacob, 266.

Wellesley v. Beaufort (1827) 2 Russ. 1; 2 Bligh (N. S.) 124.

Re Fynn (1848) 2 De G. & S. 457.

Re Besant (1879) 11 Ch. D. 508.

Re Agar-Ellis (1883) 24 Ch. D., at p. 338.

R. v. Gyngall [1893] 2 Q. B. 232.

(b) *Re Mathieson* (1917) 87 L. J. Ch. 445.

[This power is ordinarily exercised by the High Court in the Chancery Division; but it may be exercised by any Division (*R. v. Gyngall, ubi sup.*).]

*Removal of
guardian*

1924. The Court may in its discretion, on being satisfied that it is for the welfare of the minor, remove from the office of guardian:—

- (i) a guardian appointed by testament or the mother's deed;
- (ii) a guardian appointed by the Court to act jointly with the mother (*ante*, § 1913);

(iii) the mother ;

(iv) a guardian appointed by the Court in place of any of the foregoing ;

and may, if it deems it to be for the welfare of the minor, appoint another guardian in place of the guardian so removed.

Guardianship of Infants Act, 1886, ss. 2, 6.

[It is not necessary that the guardian should have been guilty of misconduct, at any rate where the Court is acting on its statutory powers (*F. v. F.* [1902] 1 Ch. 688). And it is said that, independently of statute, the Court has power to remove any guardian, if the interests of the minor require such a course (*Re McGrath* [1893] 1 Ch., at p. 147, *per Curiam*).]

1925. After a decree, or pending proceedings, for nullity, divorce, judicial separation, or the restitution of conjugal rights, the Court may make an order for the custody, maintenance, and education of the children of the marriage, being minors, or for placing them under the protection of the Chancery Division.

*Custody of
minors under
matrimonial
jurisdiction*

Matrimonial Causes Act, 1857, s. 35.

Matrimonial Causes Act, 1859, s. 4.

Matrimonial Causes Act, 1884, s. 6.

[In cases of decrees for restitution of conjugal rights, the order can only be made if the respondent refuses to obey the decree (Matrimonial Causes Act, 1884, s. 6).]

1926. Where a decree, *nisi* or absolute, for divorce, or a decree for judicial separation, has been pronounced, the Court may declare the parent by

*Power of
Court on
divorce or
judicial sep-
aration*

reason of whose misconduct such decree was made to be unfit to have the custody of the children (if any) of the marriage; and thereupon, such parent will not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children.

Guardianship of Infants Act, 1886, s. 7.

*Custody of
infant felon*

1927. Where a minor has been convicted of felony, the Chancery Division of the High Court may, upon the application of any person willing to take charge of him and provide for his maintenance and education, assign the custody of him for any period of his minority to such person.

Infant Felons Act, 1840, s. 1.

[Such order suspends the rights as to power and control over the minor of any testamentary or natural guardian (*ibid.*).]

*Special case
of female
minors*

1928. Where, on the trial of any offence under the Criminal Law Amendment Act, 1885, it is proved that the seduction or prostitution of a girl under the age of sixteen years has been caused, encouraged, or favored by her father, mother, guardian, master, or mistress, the Court may divest such person of all authority over her, and appoint any person willing to take charge of the girl to be her guardian until she has attained the age of twenty-

one years, or such age below twenty-one as the Court may direct. And the High Court may from time to time rescind or vary such order by the appointment of any other person as guardian or otherwise.

Criminal Law Amendment Act, 1885, s. 12.

1929. Where a person having the custody, charge, or care of a child or young person, has been convicted of committing in respect of such child or young person any of certain offences specified in the Children Act, 1908, or has been committed for trial in respect of such offence, or has been bound over to keep the peace towards such child or young person by any Court, that Court may, then or subsequently, and any Petty Sessional Court may subsequently, order that such child or young person be taken out of the custody, charge, or care of the person so convicted, committed for trial, or bound over, and be committed to the care of a relative of such child or young person, or some other fit person named by the Court, until such child attains the age of sixteen years, or for any shorter period. And the Court, or any court of like jurisdiction, may vary or rescind any such order.

*Offences
against
children*

Children Act, 1908, s. 21 (1).

[If the child has a parent or legal guardian, no order is to be made unless such parent or guardian is convicted of or committed for trial for the offence, or is under committal for trial for having

R R 3

been, or is proved to have been, party or privy to the offence, or has been bound over to keep the peace towards the child or young person, or cannot be found (*ibid.*, s. 21 (2)). If an order is made in respect of a person committed for trial, and that person is acquitted, or the charge is dismissed for want of prosecution, the order becomes void, except with regard to anything which has been lawfully done under it (*ibid.*, s. 21 (4)).]

*Disclaimer,
&c., of by
one testa-
mentary
guardian*

1930. If several guardians are appointed by a testament for the same person, and one or more disclaims the guardianship, or dies, the other or others remain guardians.

Eyre v. Shaftesbury (1723) 2 P. Wms. 102.

[Presumably a similar rule would apply to a guardian appointed by deed.]

*Death of
one guardian*

1931. If several guardians are appointed by the Court, the death of one terminates the guardianship of all ;^(a) but the Court will usually reappoint the survivors as a matter of course.^(b)

(a) *Bradshaw v. Bradshaw* (1826) 1 Russ. 528.

(b) *Hall v. Jones* (1827) 2 Sim. 41.

*Powers of
guardian*

1932. A father or other person having the lawful custody of a minor, has the right to restrain to a reasonable extent the acts and conduct of such minor, to determine the method of his education and maintenance,^(a) and to inflict corporal or other punishment to a reasonable extent upon him ;^(b) and he may

delegate these rights to a tutor, schoolmaster, or similar person.^(c)

- (a) *Re Agar-Ellis* (1883) 24 Ch. D. 317.

[The decision in this case shows that the powers of a father are greater in this direction than those of a testamentary guardian, or a guardian appointed by the Court, and will be less readily interfered with by the Court.]

- (b) *R. v. Hopley* (1860) 2 F. & F., at pp. 206, 207.

- (c) *Ex parte McClellan* (1831) 1 Dow. 81.

R. v. Hopley, ubi sup.

Fitzgerald v. Northcote (1865) 4 F. & F. 656.

Cleary v. Booth [1893] 1 Q. B. 465.

Mansell v. Griffin [1908] 1 K. B. 161, 947.

[The cases usually speak of a 'father' or 'parent,' and do not mention the rights of a guardian. In *R. v. New* (1904) XX T. L. R. 583, it was held that the wishes of the mother of an illegitimate child with regard to its being placed in an institution ought to prevail).]

1933. Subject to §§ 1917, 1923, 1924, 1925, *Remedies for ante*, and §§ 1934–1936, *post*, when the custody of an *interference* infant is unlawfully withheld from its father^(a) or guardian,^(b) the father or guardian may obtain restoration of the custody by means of a writ of Habeas Corpus, or by application to the Chancery Division.^(c)

- (a) *R. v. Greenhill* (1836) 4 A. & E. 624.

R. v. Howes (1860) 3 E. & E. 332.

R. v. Barnardo (1889) 23 Q. B. D. 305.

- (b) 12 Car. II (1660) c. 24, s. 8.

R. v. Isley (1836) 5 A. & E. 441.

Re Andrews (1873) L. R. 8 Q. B. 153.

- (c) *R. v. Isley, ubi sup.*

Re Spence (1847) 2 Ph. 247.

[It is uncertain whether a father or guardian may use force in order to resume control over a child. In *R. v. De Manneville*

(1804) 5 East, 221, the Court refused to interfere with the father's control of a child of very tender years; although it was alleged that he had taken it by force and stratagem from the mother. In *Ex parte Hopkins* (1732) 3 P. Wms. 152, the Court declared that the father was entitled to the guardianship of his children, and intimated that "if he can in any way gain them, he is at liberty to do so, provided no breach of the peace be made in such an attempt; but the children must not be taken away by him in returning from, any more than coming to, this Court." In *Gilbert v. Schwenk* (1845) 14 M. & W. 488, it was held that one testamentary guardian was not justified in forcibly removing the ward from the custody of the other.]

*Choice by
minor*

1934. The Court will not compel a minor of years of discretion to return to the custody of its father^(a) or guardian^(b) against its will; if the minor's welfare does not require that it should be so compelled.

(a) *Ex parte Hopkins* (1732) 3 P. Wms. 152.

R. v. Howes (1860) 3 E. & E., at pp. 336, 337.

Re Agar-Ellis (1833) 24 Ch. D. 317, at pp. 326, 331, 335, 337.

Re McGrath [1893] 1 Ch. 143, 150.

(b) *Storke v. Storke* (1730) 3 P. Wms., at p. 52.

[The age of discretion is considered to be fourteen years in a boy, sixteen in a girl (*R. v. Howes, ubi sup.*; *Re Agar-Ellis, ubi sup.*, at p. 326).]

*Discretion
of Court*

1935. When the parent of a child applies to the High Court for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child,

the Court may in its discretion decline to issue the writ or make the order.

Custody of Children Act, 1891, s. 1.

[As to the meaning of the word 'parent' in this §, see note to next §.]

1936. Where a parent has —

- (i) abandoned or deserted his child; *or*
- (ii) allowed his child to be brought up by another person at that person's expense, or by the Guardians of a Poor Law Union, for such a length of time, and under such circumstances, as to satisfy the Court that the parent was unmindful of his parental duties;

Desertion by parent

the Court may not make an order for the delivery of the child to the parent; unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child.

Custody of Children Act, 1891, s. 3.

[In §§ 1935, 1936, 'parent' includes any person at law liable to maintain the child, or entitled to the custody of the child (Custody of Children Act, 1891, s. 5).]

1937. A father has, subject to § 1939, *post*, the right to determine the religion in which his minor children shall be brought up; ^(a) and any contract

Choice of religion

whereby he purports to give up such right is void.^(b) And, even where the Court refuses to give a parent the custody of a child, it may order that the child shall be brought up in the religion in which the parent has a legal right to require the child to be brought up.^(c)

- (a) *D'Alton v. D'Alton* (1878) 4 P. D. 87.
Re Agar-Ellis (1878) 10 Ch. D. 49.
Re Scanlan (1888) 40 Ch. D. 200.
- (b) *Re Boreham* (1853) 22 L. J. (Q. B.) 116.
Andrews v. Salt (1873) L. R. 8 Ch. App. 622.
Re Nevin [1891] 2 Ch. 299.
- (c) Custody of Infants Act, 1891, s. 4.

[Here again the word 'parent' has the wide meaning expressed in § 1936 (note). But *quære* whether any one but the father has a legal right to determine the religion of a child.]

*Father's
choice after
his death*

1938. After the death of the father, the Court will, subject to § 1939, *post*, order a minor to be brought up in the religion in which the father has directed the minor to be brought up; and, if the father has left no directions, in the religion to which the father belonged at the time of his death.

- Re Austin* (1865) 34 L. J. (Ch.) 499.
- Re Newbery* (1866) L. R. 1 Ch. App. 263.
- Hawkesworth v. Hawkesworth* (1871) L. R. 6 Ch. App. 538.

[The Guardianship of Infants Act, 1886, s. 2 (which makes the mother guardian after the death of the father) has not altered this rule (*Re Scanlan*, *ubi sup.*).]

*Discretion of
Court*

1939. Notwithstanding §§ 1937 and 1938, the Court will refuse to interfere for the purpose of hav-

ing a minor educated in the religion of its father, if it considers that such interference would be prejudicial to the interests of the minor.

Andrews v. Salt (1873) L. R. 8 Ch. App. 622.

Re Newin [1891] 2 Ch. 299.

Re Newton [1896] 1 Ch. 740.

[The fact that the child has absorbed the principles of one form of religion, will be a strong ground for refusing to order it to be educated in some other form of religion. But a very strong case must be made out to induce the Court to override the wishes of the father during his lifetime; and this has only been done where the father has by his conduct abandoned his right to have the child brought up in his own religion (see *Re Agar-Ellis* (1878) 10 Ch. D. 49; *Re Newton*, *ubi sup.*).]

1940. In the event of guardians being unable to agree upon a question affecting the welfare of a minor, any of them may apply to the Court for its direction; and the Court may make such order or orders regarding the matters in difference as it shall think proper. *Disagreement of guardians*

Guardianship of Infants Act, 1886, s. 3 (3).

1941. By the institution of a suit in the Chancery Division relating to the person or property of a minor, such minor becomes a ward of Court;^(a) and any unauthorized interference with the control or custody of such minor,^(b) or unauthorized removal of such minor out of the jurisdiction of the Court,^(c) or marriage of such minor without the consent of the *Wards of Court*

Court,^(d) is a contempt of Court punishable with imprisonment.

(a) *De Pereda v. De Mancha* (1881) 19 Ch. D. 451.

[*Semble*, the rule does not apply to an alien minor domiciled abroad (*Brown v. Collins* (1883) 25 Ch. D. 56).]

(b) *Wellesley v. Duke of Beaufort* (1831) 2 R. & M. 639.

(c) *Harrison v. Goodall* (1852) Kay, 310 n.

(d) *Herbert's Case* (1731) 3 P. Wms. 116.

Re Martindale [1894] 3 Ch. 193.

Re H.'s Settlement [1909] 2 Ch. 260.

[It is a common practice, for the purpose of making a minor a ward of Court, to settle a small sum of money upon trust for the minor, and to take proceedings immediately for the administration of the trusts of the settlement (see *Re H.'s Settlement*, *ubi sup.*). But it would appear to be sufficient if property under the control of the Court is carried to the separate account of the minor (*De Pereda v. De Mancha*, *ubi sup.*).]

Legal proceedings by and against minors

1942. A minor being a plaintiff in any action must be represented by a next friend of full legal capacity; and a minor being a defendant or respondent, by a guardian *ad litem*.

R. S. C., O. XVI, rr. 16, 18, 19.

TITLE IV — POWERS OF PARENTS AND GUARDIANS IN RELATION TO THE PROPERTY OF MINORS

1943. The guardian in socage^(a) and the testam- *Real estate*
entary guardian^(b) of a minor are entitled to the *of minor*
possession and control of freehold and copyhold^(c)
lands legally vested in the minor, and to the receipt
of the rents and profits thereof,^(d) and may bring ac-
tions in their own names for the protection and
recovery of such lands.^(e)

- (a) Co. Litt. 88 b.
Goodtitle d. Newman v. Newman (1774) 3 Wils. 316.
R. v. Wilby (1814) 2 M. & S. 504.
R. v. Sutton (1835) 3 A. & E., at pp. 612, 613.
- (b) 12 Car. II (1660) c. 24, s. 9.
Helyar v. Beckett [1902] 1 Ch. 391.
- (c) *R. v. Wilby, ubi sup.*

[But, as regards copyhold lands, the guardian in socage and the testamentary guardian would be displaced by the guardian entitled according to the custom of the manor, if any (*Clench v. Cudmore* (1694) 3 Lev. 395).]

- (d) *Palmer v. Danby* (1701) 1 Eq. Ca. Ab. 261.
- (e) *Eyre v. Shaftesbury* (1722) 2 P. Wms., at p. 122.
R. v. Oakley (1809) 10 East, 491.

*Guardian
appointed
by Court*

1944. A guardian appointed by the Court has no power over the ward's property except such as may be entrusted to him by the Court.

R. v. Sutton (1835) 3 A. & E. 608.

Re Bond (1846) 11 Jur. 114.

Rimington v. Hartley (1880) 14 Ch. D. 630.

Re Willoughby (1885) 30 Ch. D. 324.

[This seems to be implied in these cases, though there is no very precise statement to this effect.]

Parents

1945. A father or mother is not, as such, entitled to any control over, or to any legal interest in, the lands of his child being a minor.

R. v. Sherrington (1832) 3 B. & Ad. 714.

*Leases by
guardian in
socage*

1946. A guardian in socage may grant a lease of the ward's lands to endure till the ward attains the age of fourteen years.

Eyre v. Shaftesbury (1722) 2 P. Wms. 122.

R. v. Oakley (1809) 10 East, 491.

R. v. Sutton (1835) 3 A. & E., at p. 613, *per* Lord Denman, C. J.

*Leases by
testamentary
guardian*

1947. A testamentary guardian may grant a lease of the ward's lands to endure till the ward attains the age of twenty-one years.

Roe v. Hodgson (1760) 2 Wils. 129.

Shaw v. Shaw (1788) Vern. & Scriv. 607 (Ireland).

[If a guardian in socage or a testamentary guardian purports to grant a lease to endure beyond the period for which a valid lease might have been made, it is uncertain whether such lease is voidable at the option of the ward on attaining full age, or is void *ab initio* (Bac. Ab. *Lease* I. 9; *Guardian G*; *Roe v. Hodgson*, *ubi sup.*).]

[In practice, dispositions by way of lease or sale, or otherwise, of the land of a minor are made under the powers of the Settled Land Acts 1882-1890, or (more rarely) of the Settled Estates Act, 1877 (see *ante*, Bk. III, Sect. VII, Tit. I, § 1504); and the management of the land of minors is carried out by trustees under the provisions of the Conveyancing Act, 1881, s. 42, and the Conveyancing Act, 1911, s. 14 (*ante*, Bk. III, Sect. VII, Tit. I, § 1505). The Infant's Property Act, 1830, also contains provisions enabling the Court to authorize guardians on behalf of minors to surrender and grant leases (*Re Griffiths* (1885) 29 Ch. D. 248). Guardians are authorized to represent their wards in certain cases where it is necessary or desirable to dispose of the ward's land for public purposes, e. g. under the Lands Clauses Consolidation Act, 1845, ss. 7, 8, 18, 71, 72; Schools Sites Act, 1841, s. 5; Literary and Scientific Institutions Act, 1854, s. 5. A guardian has also power to do certain formal acts on behalf of a ward who is owner of a British ship (Merchant Shipping Act, 1894, s. 55; *Michael v. Fripp* (1868) L. R. 7 Eq. 95).]

1948. A guardian in socage (? any other guardian) cannot present to a benefice belonging to the ward. *Rights of patronage*

Co. Litt. 17 b, 89 a.
3 Inst. 156.

[The minor may himself present, whatever be his age (*Hearle v. Greenbank* (1749) 3 Atk., at p. 710).]

1949. A father, or (subject to § 1950) a guardian, is not entitled to receive, and cannot give a valid receipt for, a legacy bequeathed to a minor;^(a) unless the Court authorizes,^(b) or the testator has authorized,^(c) such father or guardian to receive it. *Legacies to minors*

- (a) *Dugley v. Tolferry* (1715) 1 P. Wms. 285.
Rotbérham v. Fanshaw (1748) 3 Atk., at p. 629, *per* Lord Hardwicke, C.
- (b) *Hill v. Chapman* (1789) 2 Bro. C. C. 612.
Welsb v. Welsb (1852) 1 Drew. 64.
- (c) *Cooper v. Thornton* (1790) 3 Bro. C. C. 96, 186.

Testa-
mentary
guardians

1950. A testamentary guardian of a minor is entitled to the custody, tuition, and management of the goods, chattels, and personal estate of the minor,^(a) and can (*semble*) give a valid receipt for a legacy bequeathed to the minor.^(b)

(a) 12 Car. II (1660) c. 24, s. 9.

Guardianship of Infants Act, 1886, s. 4.

(b) *McCreight v. McCreight* (1849) } (*Quære*, whether such a guar-
13 Ir. Eq. 314. } dian could require payment.)
Re Long [1901] W. N. 166. }

[It was held in *Re Cresswell* (1881) 45 L. T. 468, that a testamentary guardian is not entitled to payment of a minor's legacy which has been paid into Court; and, *semble*, a guardian, not being a testamentary guardian, has no right to receive or deal with the personal property of a minor (*Re Hellmann's Will* (1866) L. R. 2 Eq. 362; *Re Chatard* [1899] 1 Ch. 712 (foreign guardian)). In practice, trustees and executors, having money in their hands to which a minor is entitled, rarely pay such money to the testamentary guardian (if any), but pay it into Court under the Trustee Act, 1893, s. 42 (R. S. C., O. LIV b, r. 4; *Re Salomons* [1920] 1 Ch. 290).]

Guardian
appointed
by deed

1951. A guardian appointed by the deed of the father or mother of a minor has the same powers with regard to the minor's property as a testamentary guardian.

12 Car. II (1660) c. 24, ss. 8, 9.

Guardianship of Infants Act, 1886, ss. 3, 4.

Services of
child

1952. A father is entitled to the services of his child being a minor, so long as the child is living with him, or, not being in the service of some other person, is only temporarily absent from his house.

[According to Blackstone, *Comm.* I, 453, a father 'may have the benefit of his children's labours while they live with him, and are maintained by him.' But there appears to be no judicial authority for this proposition, except the cases which refer to the parent's right to services as founding an action for seduction (e. g. *Terry v. Hutchinson* (1868) L. R. 3 Q. B. 599). The American Courts have held that a father is entitled to the earnings of a child; but such English authority as there is appears to be the other way (*Ex parte Macklin* (1755) 2 Ves. Sen. 675; *R. v. Chillesford* (1825) 4 B. & C. 94, 101).]

1953. A guardian is, in relation to any property of his ward which comes to his hands, in the position of a trustee for the ward.^(a) He cannot alienate his office.^(b)

*Fiduciary
position of
guardian*

(a) *Beaufort v. Benty* (1721) 1 P. Wms. 703.

Mathew v. Brise (1851) 14 Beav. 341.

(b) *Bedell v. Constable* (1669) Vaugh., at p. 181.

[For the discretionary powers of trustees of the property of minors to pay income to the minor's parent or guardian for his maintenance, education, or benefit, see *ante*, Bk. III, Sect. XVII, Tit. IV, §§ 1808, 1809.]

BOOK V

SUCCESSION

SECTION I

TESTAMENTARY SUCCESSION

TITLE I—THE MAKING OF TESTAMENTS AND CODICILS

1954. Subject to §§ 1961–1965, *post*, no testa- *Form of will*
ment or codicil is valid unless: —

- (i) it is in writing; *and*
- (ii) it is signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; *and*
- (iii) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who afterwards attest and subscribe the testament or codicil, in the presence of the testator.^(a)

If these provisions are complied with, a document, intended to operate as a testament, may be valid as such, notwithstanding that it does not in terms purport to be a testament.^(b)

- (a) Wills Act, 1837, s. 9.
Cooper v. Bocket (1843) 3 Curt., at pp. 659-660; 4 Moo. P. C. 419.
Goods of Wilson (1866) L. R. 1 P. & M. 269.
Griffiths v. Griffiths (1871) L. R. 2 P. & M. 300.
- (b) *Goods of Morgan* (1866) L. R. 1 P. & M. 214.
Ferguson-Davie v. Ferguson-Davie (1890) 15 P. D. 109.
Goods of Slinn (1890) *ibid.*, 156.

[As to what is the 'foot or end' of a testament, see Wills Act Amendment Act, 1852. The witnesses need not subscribe their names at the same time (*Brown v. Skirrow* [1902] P., at p. 5); and no special form of attestation is necessary, though a form stating that the formalities prescribed by the Wills Act, 1837, s. 9, have been complied with, has advantages in practice. A mark is (*Goods of Blewitt* (1880) 5 P. D., at p. 117), but (*semble*) a seal is not (*Smith v. Evans* (1751) 1 Wils. 313), a sufficient signature, either for the testator or the witnesses.]

'Presence'
 of witnesses

1955. The witnesses must have seen, or have been in such a position that they were able to see, the testator sign; or, if the testator has acknowledged his signature to them, they must have seen, or have been in such a position that they were able to see, the acknowledged signature.

Daintree v. Butcher (1888) 13 P. D. 102.
Brown v. Skirrow [1902] P. 3.

Witnesses
 need not
 know nature
 of document

1956. It is immaterial that the witnesses did not know that the document, of which they were attesting the signature, was a testament.

Keigwin v. Keigwin (1843) 3 Curt. 107.
Wright v. Sanderson (1884) 9 P. D. 149.

[It is sometimes said that s. 13 of the Wills Act, 1837, which provides that a testament or codicil executed in manner described in § 1954 does not require any further publication, is an authority for the rule in the text.]

1957. When a testament or codicil treats documents already in existence, but not executed as required by § 1954, as part of the testament or codicil, these documents will by such reference be incorporated into the testament or codicil; if it is proved that they are the documents referred to.^(a) When a testament is republished by a codicil, this rule is applied to documents coming into existence between the date of the execution of the testament and the date of the execution of the codicil; if they are treated by the codicil as existing documents, or if the testament, construed as being executed at the date of the execution of the codicil, treats them as existing documents.^(b)

- (a) *Allen v. Maddock* (1858) 11 Moo. P. C. 427.
Goods of Smart [1902] P., at pp. 240, 241.
University College v. Taylor [1908] P. 140.
- (b) *Goods of Lady Truro* (1866) L. R. 1 P. & M. 201.
Durham v. Northen [1895] P. 66.
Goods of Smart [1902] P. 238.

1958. A person cannot give to another the power to make a testament for him; but he can make the validity of his testament dependent upon a contingency, and such contingency may be the approval of another person.

Parsons v. Lanoe (1748) 1 Ves. Sen. 189.

Goods of Smith (1869) L. R. 1 P. & M. 717.

[Whether words importing a contingency are to be construed merely as a reason for making the disposition (in which case they will not affect its operation), or as a true condition affecting its operation, is a question of construction for the Court, which looks at the language employed, and, if that is ambiguous, the circumstances, and even the oral declarations of the testator (*Goods of Spratt* [1897] P. 28; *Estate of Vines* [1910] P. 147).]

Codicils

1959. When a codicil exists with a testament, it is read as part of the testament;^(a) but if the testament is not forthcoming, and its provisions cannot be proved at the testator's death, and the codicil is forthcoming, the codicil operates alone.^(b)

(a) *Fuller v. Hooper* (1750) 2 Ves. Sen., at p. 242, *per* Lord Hardwicke.

(b) *Goods of Clements* [1892] P. 254.

[It is the custom to describe a supplementary testament, which assumes the existence of a prior principal testament, as a 'codicil.' But there is, for legal purposes, no difference between a testament and a codicil.]

Confirmation of wills and codicils

1960. If a testator confirms his testament, any codicils thereto not previously revoked are (subject to the terms of the confirmation) likewise confirmed.

Goods of De La Saussaye (1873) L. R. 3 P. & M. 42.

Green v. Tribe (1878) 9 Ch. D., at p. 234, *per* Fry, J.

[A testament or codicil can only be confirmed by a document executed in compliance with the provisions of § 1954, *ante*.]

1961. The formal validity of a testament of immovables situated in England is, subject to §§ 1963 and 1964, governed by the provisions set out in § 1954.^(a) The formal validity of a testament of movables is, subject as aforesaid, governed by the law of the testator's domicile at the time of his death.^(b) But no testament or codicil is invalidated, nor is its construction altered, by the testator's subsequent change of domicile.^(c)

Law governing form of wills

(a) *Pepin v. Bruyère* [1902] 1 Ch. 24.

(b) *In re Price* [1900] 1 Ch., at p. 451, *per* Stirling, J.

(c) Wills Act, 1861, s. 3 (which applies to aliens as well as British subjects (*Re Groos* [1904] P. 269)).

1962. A power to appoint movables by testament, conferred by an English settlement, must be exercised by a testament executed either according to the forms required by the law of the testator's domicile at the time of his death (in addition to the forms, if any, prescribed by the settlement^(a)) or according to the requirements of § 1954, *ante*.^(b) And if the power is exercised by an instrument executed according to the requirements of § 1954, there may be a valid exercise of the power, though the instrument is invalid as a testament because it does not satisfy the forms required by the law of the testator's domicile.^(c)

Form of testamentary appointment

(a) *Barretto v. Young* [1900] 2 Ch. 339.

Re Walker [1908] 1 Ch. 560.

(b) *D' Huart v. Harkness* (1865) 34 Beav. 324.

In re Price [1900] 1 Ch. 442.

(c) *Goods of Hallyburton* (1866) L. R. 1 P. & M. 90.

Goods of Huber [1896] P. 209.

Re Walker, ubi sup.

[Bk. III, Sect. VI, Tit. I, § 1465 (i), which also deals with powers of appointment affecting land, must be read subject to this §.]

*Wills of
British sub-
jects made
abroad*

1963. A testament or codicil of personal estate (including leaseholds^(a)) made out of the United Kingdom by a British subject (whatever be that subject's domicile at the time of making the testament or at his death) is well executed for the purpose of admission to probate if executed in any one of the following forms: —

- (i) the form required by the law of the place where it was made; *or*
- (ii) the form required by the law of the place where the testator was domiciled when it was made; *or*
- (iii) the form required by the law of that part of His Majesty's Dominions where the testator had his domicile of origin.^(b)

(a) *Re Grassi* [1905] 1 Ch. 584.

(b) Wills Act, 1861, s. 1.

[It has been held that a testament made abroad, though admissible to probate under the provisions of the above §, is not a good exercise of a testamentary power of appointment under an English settlement, unless it complies with the requirements of § 1954 (*Re Kirwan's Trusts* (1883) 25 Ch. D. 373; *Hummel v. Hummel* [1898] 1 Ch. 642). But the correctness of these decisions is open to doubt (*Re Simpson* [1916] 1 Ch. 502; *Re Wilkinson* [1917] 1 Ch. 620).]

1964. A testament or codicil of personal estate made within the United Kingdom by a British subject (whatever be that subject's domicile at the time of making the testament or at his death) is well executed, and will be admitted to probate, if executed according to the forms required by the law for the time being in force in that part of the United Kingdom where it was made.

*Wills of
British sub-
jects made
in the
United
Kingdom*

Wills Act, 1861, s. 2.

[These sections of the statute apply only to the testaments of British subjects; and therefore the testament of an alien, domiciled in the foreign State of which he is a subject, which is executed in that State in such a manner as to satisfy the requirements of English law, but not in such a manner as to satisfy the requirements of the foreign State, is invalid (*Goods of Von Buseck* (1881) 6 P. D. 211); even though the alien's domicile of origin was British (*Bloxam v. Favre* (1883) 8 P. D. 101; *affd.* on appeal (1884) 9 P. D. 130).]

1965. A soldier being on active military service, and a mariner or seaman being at sea, may make a testamentary disposition of his real and personal estate, either orally or by a writing which does not comply with the requirements of § 1954.

*Military
and marine
wills*

Wills Act, 1837, s. 11; Wills (Soldiers and Sailors) Act, 1918, s. 3.
Drummond v. Parish (1843) 3 Curt. 522.

[A soldier is on active military service not only when he is serving on a campaign, but also when, in obedience to orders, the steps preliminary to starting on a campaign, such as going into barracks with a view to being sent on active service, have been taken (*Goods of Hiscock* [1901] P. 78), or when an order to mobilize has been issued (*Gattward v. Knee* [1902] P. 99). A mariner or seaman is 'at sea' if, having joined his ship, he is residing on her, even if he is on shore by virtue of temporary leave (*Earl of Euston v. Seymour*

(1802), cited 2 Curt. at p. 339; *Goods of Ley* (1840) 2 Curt. 375; *Goods of M^r Murdo* (1867) L. R. 1 P. & M. 540; or if he is returning by sea from, or (*semble*) proceeding by sea to, his duty on his ship (*Goods of Daniel Saunders* (1865) L. R. 1 P. & M. 16). Substantial restrictions on the form and effect of the testaments, both of seamen and marines in the Royal Navy and of seamen in the mercantile marine, have, however, been imposed by statute (Navy and Marines (Wills) Acts, 1865, 1897; Merchant Shipping Act, 1894, s. 177). A female nurse who has received orders to join a hospital ship under military control is a soldier on active military service for the purposes of this § (*Re Stanley* [1916] 1 P. 192). The power to dispose includes a power to revoke a former will, even though the former will was in regular form (*Wood v. Gossage* (1921) *Times* Newspaper, 19th January (C. A.).]

TITLE II — THE REVOCATION, ALTERATION, AND REPUBLICATION OF TESTAMENTS AND CODICILS

1966. Subject to Tit. I, §§ 1963 and 1964, *ante*, the validity of a revocation of a testament or codicil of immovables situated in England is governed by the provisions of this Title.^(a) The validity of the revocation of a testament or codicil of movables is governed by the law of the testator's domicile at the time of his death.^(b) But no testament or codicil is revoked or invalidated, nor is its construction altered, by the testator's subsequent change of domicile.^(c) Law governing revocation

(a) There seems to be no direct authority for this proposition, but its truth can hardly be questioned. (See Dicey, *Conflict of Laws* (2nd ed.) p. 505.)

(b) *Bremer v. Freeman* (1857) 10 Moo. P. C., at p. 359.
Re Price [1900] 1 Ch., at p. 451.

(c) Wills Act, 1861, s. 3.
Goods of Reid (1866) L. R. 1 P. & M. 74.

[This section of the Wills Act, 1861, applies both to aliens and to British subjects (*Re Groos* [1904] P. 269). Whether it applies to remedy a material invalidity caused by a change of domicile, as well as a formal invalidity, *quære*. (See Dicey, *Conflict of Laws* (2nd ed.) p. 637.)]

1967. A testament or a codicil may be revoked or altered at the pleasure of the testator. A testator Every will revocable

cannot, by contract or otherwise, deprive himself of this power.

Vynior's Case (1610) 8 Rep., at fo. 82 a.

[Even if a person has contracted to make a testament containing special provisions, he may, nevertheless, revoke such testament; leaving the persons injured by such revocation to their remedy (if any) for the breach of contract (*Robinson v. Ommanney* (1883) 23 Ch. D. 285; *Re Parkin* [1892] 3 Ch. 510).]

Joint wills

1968. If two or more persons make a joint testament or codicil, or separate testaments or codicils in identical terms, any of such persons may at any time revoke or alter his part of the joint testament or codicil, or his separate testament or codicil.^(a) But if one of the parties dies, and the other or others take a benefit under his testament, the estates of such other or others will be liable, if he or they should alter their testaments, to carry out the original arrangement.^(b) If one of the parties to a joint testament or codicil dies, probate will be granted of so much of the instrument as becomes operative at his death.^(c)

(a) *Hobson v. Blackburn* (1822) 1 Add. 274.

Estate of Heys [1914] P. 192.

(b) *Dufour v. Pereira* (1769) Dick. 419.

Walpole v. Orford (1797) 3 Ves. 402.

Stone v. Hoskins [1905] P. 194.

(c) *Goods of Piazzzi-Smith* [1898] P. 7.

*Revocation
by marriage*

1969. No testament or codicil is revoked by any presumption of an intention on the ground of an

alteration in circumstances;^(a) but every testament or codicil is revoked by the testator's marriage, except in so far as it is made in exercise of a power of appointment under which the property thereby appointed would not, in default of such appointment, pass to the persons entitled to the testator's property in the event of his intestacy.^(b)

(a) Wills Act, 1837, s. 19.

(b) *Ibid.*, s. 18.

Goods of Russell (1890) 15 P. D. 111.

Goods of Wardrop [1917] P. 54 (military will).

1970. A testament or codicil may be revoked by writing duly executed as a testament and declaring an intention to revoke it,^(a) or revoked or altered by a later testament or codicil,^(b) in so far as an intention to revoke or alter it appears, either expressly or by implication, in such later testament or codicil.^(c) If the intention of the testator is to alter but not to revoke his earlier testaments or codicils by later instruments, both the earlier and the later instruments will be admitted to probate, as together containing the testament of the deceased.^(d)

*Formal
revocation*

(a) Wills Act, 1837, s. 20.

Goods of Gosling (1886) 11 P. D. 79.

(b) Wills Act, 1837, s. 20.

(c) *Lemage v. Goodban* (1865) L. R. 1 P. & M. 57.

Cadell v. Wilcocks [1898] P. 21.

Kent v. Kent [1902] P. 108.

Estate of Bryan [1907] P. 125.

(d) *Lemage v. Goodban*, *ubi sup.*

Goods of De La Saussaye (1873) L. R. 3 P. & M. 42.

[A duly executed testament, which is inoperative owing to the fact that it depends upon a contingency which has not happened, is inoperative to revoke an earlier testament (*Goods of Hugo* (1877) 2 P. D. 73). Two inconsistent testaments, each bearing the same date, are, in the absence of proof as to the order of execution, both void for uncertainty so far as they are inconsistent (*Phipps v. Anglesey* (1751) 7 Bro. P. C., at p. 452).]

*Revocation
by destruc-
tion*

1971. A testament or codicil will be revoked if the testator, or some other person in his presence and by his direction, burns, tears, or otherwise destroys the testamentary document, with the intention of revoking it.^(a) An act of destruction done by another person without the authority of the testator cannot be subsequently ratified by him.^(b)

(a) Wills Act, 1837, s. 20.

(b) *Mills v. Milward* (1890) 15 P. D. 20.
Gill v. Gill [1909] P., at p. 161.

[Neither the destruction without the intention (*Gill v. Gill, ubi sup.*) nor the intention without the destruction (*Cheese v. Lovejoy* (1877) 2 P. D. 251) will be sufficient; and the extent of the destruction must be such as to render the document either incomplete in form (*Goods of Morton* (1887) 12 P. D. 141) or unintelligible in substance (*Leonard v. Leonard* [1902] P. 243) as a testament. A testament may be partially revoked by the destruction of a part of the testamentary document, if such appears to have been the intention of the testator (*Goods of Woodward* (1871) L. R. 2 P. & M. 206).]

*Mechanical
alterations*

1972. A testament or codicil may be revoked or altered by obliterations, interlineations, or other changes in the testamentary document made after execution, with intent to revoke or alter; but only

in so far as the words of the document before such change are so effaced that they are not apparent without physical interference with the document.^(a) But such interlineations and changes cannot themselves be admitted to probate, as forming part of the testament; unless they are executed in compliance with the requirements of Tit. I, § 1954, *ante*.^(b)

(a) Wills Act, 1837, s. 21.

Brooke v. Kent (1840) 3 Moo. P. C. 334.

Townley v. Watson (1844) 3 Curt. 761.

Goods of Horsford (1874) R. L. 3 P. & M. 211.

Ffinch v. Combe [1894] P. 191.

(b) Wills Act, 1837, s. 21.

[Expert assistance (short of physical interference) may be employed to decipher the original words (*Ffinch v. Combe*, *ubi sup.*); and, if the effacement was intended only to operate contingently upon the validity of a substituted clause, even physical interference to decipher the original words is permitted (*Goods of Horsford*, *ubi sup.*; *Ffinch v. Combe*, *ubi sup.*, at p. 197).]

1973. A testament which expressly revokes a former testament revokes appointments made by such testament.^(a) Whether such appointments are revoked by a testament which does not expressly revoke former testaments, depends upon the words used by the testator in the later testament.^(b) But general words of bequest in a later testament will not, without more, revoke an appointment made by an earlier testament in exercise of a special power of appointment.^(c)

*Revocation
of appoint-
ments*

(a) *Sotheran v. Dening* (1881) 20 Ch. D. 99.

In re Kingdon (1886) 32 Ch. D. 604.

S S 2

(b) *Kent v. Kent* [1902] P. 108.

(c) *Cadell v. Wilcocks* [1898] P. 21.

[Probably an appointment under a general power is revoked in such circumstances (*Sotheran v. Denning*, *ubi sup.*, at p. 106, *per* Jessel, M. R.).]

*Animus
revocandi*

1974. An act or document, purporting to revoke or alter a testament or codicil, is not effectual, unless the intention to revoke or alter accompanies the execution of the act or document, and is unconditional.^(a) If the intention to revoke or alter depends upon the existence or non-existence of facts which the testator erroneously supposes to exist or not to exist,^(b) or upon a mistaken view of the validity of an intended substituted disposition,^(c) the apparent revocation or alteration has no effect. ('Dependent Relative Revocation.')

(a) *Powell v. Powell* (1866) L. R. 1 P. & M., at p. 212, *per* Wilde, J.

Dancer v. Crabb (1873) L. R. 3 P. & M. 98.

(b) *Campbell v. French* (1797) 3 Ves. 321. (But see *Thomas v. Howell* (1874) L. R. 18 Eq. 198.)

(c) *Onions v. Tyrer* (1716) 1 P. Wms. 343.

Perrott v. Perrott (1811) 14 East, at pp. 439, 440.

Dancer v. Crabb, *ubi sup.*

Stanford v. White [1901] P. 46.

[The principle of dependent relative revocation is not applied when the testator, being under a mistake as to an imperative rule of law, e. g. against a devise of land to a charity, or against a particular exercise of a power of appointment, revokes a previous disposition to give effect to such an object (*Tupper v. Tupper* (1855) 1 K. & J. 665; *Quinn v. Butler* (1868) L. R. 6 Eq. 225). But the distinction is not very clear. Presumably, a conditional revocation operates as soon as the condition has been fulfilled.]

REVOCATION, ETC., OF TESTAMENTS 1251

1975. No conveyance made or other act done, subsequently to the execution of a testament or codicil, relating to any real or personal estate therein comprised, other than an act which has the effect of revoking, in manner described in §§ 1969–1972, *ante*, any disposition contained in such testament or codicil, will prevent the operation of the testament or codicil with respect to such interest in such real or personal estate as the testator could dispose of by testament or codicil at the time of his death. *Dealings with property*

Wills Act, 1837, s. 23.

Ford v. De Pontes (1861) 30 Beav., at pp. 593, 594.

Saxton v. Saxton (1879) 13 Ch. D. 359.

1976. A revocation of a testament is presumed to be a revocation of the testament with all the codicils thereto.^(a) But if it appears from the circumstances of the case, that the testator did not intend to revoke all or any of the codicils, such codicil or codicils will be operative.^(b) *Codicils revoked with will*

(a) *Grimwood v. Cozens* (1860) 2 Sw. & Tr., at p. 368.

Goods of Greig (1866) L. R. 1 P. & M. 72.

Gardiner v. Courtbope (1886) 12 P. D. 14.

(b) *Farrer v. St. Catherine's College* (1873) L. R. 19 Eq., at p. 23,
per Lord Selborne, C.

Sugden v. Lord St. Leonards (1876) 1 P. D., at p. 206.

Goods of Bleckley (1883) 8 P. D. 169.

1977. If there is evidence that a person made a testament or codicil, and the testament or codicil is *Lost wills*

not forthcoming at his death, there is a presumption of law that the testator destroyed it with the intention of revoking it.^(a) Evidence may be given to rebut this presumption, and to prove the contents of the lost instrument;^(b) but if the evidence offered to prove its contents is parol evidence only, it must be of extreme cogency.^(c)

(a) *Eckersley v. Platt* (1866) L. R. 1 P. & M. 281.

[This presumption does not apply if the testator becomes insane after the execution of the testament (*Sprigge v. Sprigge* (1868) L. R. 1 P. & M. 608).]

(b) *Sugden v. Lord St. Leonards* (1875) 1 P. & D. 154.

Re Spain (1915) XXXI T. L. R. 435.

(c) *Woodward v. Goulstone* (1886) L. R. 11 App. Ca., at p. 475, *per* Lord Herschell, C.

[Post-testamentary declarations of the testator are not admissible to prove that a lost testament was duly executed (*Atkinson v. Morris* [1897] P. 40). It is not quite settled whether such declarations are admissible to prove the contents of the testament (*Sugden v. Lord St. Leonards* (1875) 1 P. D., at p. 241; *Woodward v. Goulstone*, *ubi sup.*, at pp. 478-481).]

Lost revocation

1978. In order to establish the revocation of a testament or codicil by a missing testament or codicil subsequently executed, either documentary or conclusive evidence of the contents of such subsequent testament or codicil must be given.

Cutto v. Gilbert (1854) 9 Moo. P. C. 131 (see esp. pp. 140-141).

Alterations in will

1979. If a testament or codicil is produced, with alterations on the face of it, the person seeking to

take advantage of the alterations must prove that such alterations were made before the testament was executed.^(a) In the absence of evidence, it will be presumed that the alterations were made after execution.^(b)

(a) *Williams v. Ashton* (1860) 1 J. & H. 115.

(b) *Cooper v. Bockett* (1846) 4 Moo. P. C. 419.

[If, however, the alterations take the form of interlineations, the Court may presume, from the nature of the interlineations and the internal evidence of the document, that the interlineations were made before execution (*Goods of Cadge* (1868) L. R. 1 P. & M. 543).]

1980. A testament or codicil which has been re-*Revival of will*
voked may, unless the document containing it has been wholly destroyed with intent to revoke,^(a) be revived by re-execution with the formalities required by Tit. I, § 1954, *ante*, or by a duly executed codicil which shows an intention to revive the revoked testament or codicil.^(b) Such intention may be shown either by express words, or by dispositions or language inconsistent with any other intention.^(c)

(a) *Rogers v. Goodenough* (1862) 2 S. W. & Tr. 342.

Goods of Steele (1868) L. R. 1 P. & M. 575.

Goods of Alfred Reade [1902] P. 75.

(b) Wills Act, 1837, s. 22.

Re Smith (1890) 45 Ch. D. 632.

(c) *Goods of Steele, ubi sup.*, at p. 578.

Goods of Reynolds (1873) L. R. 3 P. & M. 35.

Goods of Dennis [1891] P. 326.

[A reference by a testator in a later testament or codicil to a revoked testament by its date will, *prima facie*, revive that testament, if it assumes that such testament is still operative. But this

inference may be rebutted, if it can be proved from the circumstances that the testator has made a mistake in the date, and did not intend to refer to that testament (*Goods of Ince* (1877) 2 P. D. 111). But if a codicil is made to a revoked testament, and the codicil is drawn with reference to the provisions of such testament, the revoked testament will be revived; even though the testator did not in fact intend to revive it (*Goods of Stedham*; *Goods of Dyke* (1881) 6 P. D. 205).]

*Codicils
revived
with will*

1981. A codicil which revives a revoked testament is presumed to revive all the codicils thereto.^(a) But this presumption may be rebutted by the express words,^(b) or by the nature of the contents, of the reviving codicil.^(c)

(a) *Green v. Tribe* (1878) 9 Ch. D., at p. 234.

(b) *Ibid.*

(c) *Goods of Reynolds* (1873) L. R. 3 P. & M. 35.

*Partial
revocation*

1982. When any testament or codicil which has been partly revoked, and afterwards wholly revoked, is revived, the revival does not extend to the part originally revoked; unless an intention of the testator to the contrary can be shown.

Wills Act, 1837, s. 22.

Neate v. Pickard (1843) 2 Notes of Cases, 406.

*Effect of
revival*

1983. Subject to Tit. IV, § 1996, *post*, a testament revived by a later testament or codicil speaks as from the date of the later document.

Re Champion [1893] 1 Ch. 101.

Re Rayer [1903] 1 Ch. 685.

TITLE III — CAPACITY TO MAKE OR ATTEST A TESTAMENT OR CODICIL

1984. Capacity to make or attest a testament of immovables situated in England is governed by the provisions of this Title.^(a) Capacity to make or attest a testament of movables is governed by the law of the testator's domicile at the time of his death.^(b)

Law governing testamentary capacity

(a) *In re Hernando* (1884) 27 C. D. 284.

(b) *Goods of Maraver* (1828) 1 Hagg. Eccl. 498.
Re Lewal [1918] 2 Ch. 391.

1985. Subject to the exceptions contained in this Title, every person has full capacity to make and attest a testament.

General capacity

Wills Act, 1837, s. 3.

1986. Subject to § 1984, no person under the age of twenty-one years can make a valid testament; except that a soldier being on active military service, and a mariner or seaman being at sea, may make a testamentary disposition of real and personal estate at the age of fourteen,^(b) and exercise a testamentary power of appointment.^(c)

Wills of infants

(a) Wills Act, 1837, s. 7.

(b) *Ibid.*, s. 11. Doubtless 'personal estate' includes for this purpose leasehold interests in land (*Re Grassi* [1905] 1 Ch. 584, on the Wills Act, 1861).

Wills (Soldiers and Sailors) Act, 1918, s. 3.

(c) *Re Wernher* [1918] 2 Ch. 82.

Goods of Farquhar (1846) 4 Notes of Cases, 651.

Goods of M' Murdo (1867) L. R. 1 P. & M. 540.

[A married woman has full testamentary capacity over her separate property belonging to her at her death; whether or not she was entitled to any such property at the time when she made her testament. And a testament of separate property will pass property acquired after the death of her husband. (Married Women's Property Act, 1882, s. 1; Married Women's Property Act, 1893, s. 3; *In re Wylie* [1895] 2 Ch. 116.) Outlawry in consequence of criminal proceedings causes no testamentary incapacity; but the forfeiture of the outlaw's property thereby incurred restricts the operation of the testament to directions not dealing with such property (Forfeiture Act, 1870, s. 1; *Goods of Bailey* (1861) 1 Sw. & Tr. 156). A convict can (probably) make a valid testament (*Ex parte Graves* (1881) 19 Ch. D. 1).]

Soundness
of mind
essential

1987. No person can make a testament unless he is of sound mind, memory, and understanding when he makes it.^(a) Subject to § 1988, *post*, a testator will be presumed to have had these qualifications till the contrary is proved.^(b)

- (a) *Mountain v. Bennet* (1787) 1 Cox, at p. 356, *per* Eyre, C. B.
Boughton v. Knight (1873) L. R. 3 P. & M. 64.

[If a testator was of sound mind when he gave the instructions for the preparation of his testament, and the testament was drawn in pursuance of those instructions, the fact that he did not understand its provisions when he executed it is immaterial; if he remembers that he gave the instructions, and accepts the document as carrying them out (*Parker v. Felgate* (1883) 8 P. D. 171; approved by the J. C. in *Perera v. Perera* [1901] A. C., at p. 361).]

- (b) *Sutton v. Sadler* (1857) 3 C. B. N. S. 87.

Presumption
of unsound-
ness

1988. If it be proved that a testator was not of sound mind, memory, and understanding at any time

prior to the making of the testament, his testament will be presumed to be invalid, until it is proved that he was of sound mind when he made it. The appearance and contents of the testament, and the circumstances attendant upon its execution, will be considered in coming to a conclusion on this point.

A. G. v. Parnter (1792) 3 Bro. C. C. 441.
Cartwright v. Cartwright (1793) 1 Phillim. 90.
Symes v. Green (1859) 1 Sw. & Tr. 401.

1989. If a testator suffers from a particular delusion, but is otherwise sane, his testament is valid if its contents have not been influenced by the particular delusion. *Particular delusions*

Dew v. Clark (1826) 3 Add. 79.
Banks v. Goodfellow (1870) L. R. 5 Q. B. 549.
Smee v. Smee (1879) 5 P. D. 84.

1990. A testament made while the testator was in a state of intoxication is invalid. *Will of intoxicated person*

Ayrey v. Hill (1824) 2 Add. 206.

1991. Deafness and dumbness,^(a) blindness,^(b) and inability to read,^(c) cause no testamentary incapacity. But the Court will require proof that a person thus afflicted knew and approved of the contents of his alleged testament.^(d) *Physical defects and illiteracy*

- (a) *Goods of Francis Owston* (1862) 2 Sw. & Tr. 461.
Goods of Geale (1864) 3 Sw. & Tr. 431.
- (b) *Re Charles Axford* (1860) 1 Sw. & Tr. 540.
- (c) *Barton v. Robins* (1769) 1 Phill. 455 n. (b).
- (d) *Longchamp v. Fish* (1807) 2 Bos. & P. N. R. 415.
Edwards v. Fincham (1842) 4 Moo. P. C. 198.

Force,
fraud, and
undue
influence

1992. A testament or codicil made as the result of the exercise of force,^(a) or fraud,^(b) or undue influence,^(c) is invalid, in so far as its dispositions have been caused by these means.^(d)

- (a) *Mountain v. Bennet* (1787) 1 Cox, at p. 355.
- (b) *Lord Donegal's Case* (1751) 2 Ves. Sen., at p. 408, *per* Lord Hardwicke, C.
Allen v. McPherson (1847) 1 H. L. C., at p. 208.
- (c) *Wingrove v. Wingrove* (1886) 11 P. D. 81.
Baudains v. Richardson [1906] A. C., at pp. 184, 185, *per* Lord Macnaghten.
- (d) *Trimblestown v. D'Alton* (1827) 1 Dow. & Cl., at p. 95, *per* Lord Eldon, C.
Allen v. McPherson, ubi sup., at p. 233, *per* Lord Campbell.

What is
'undue
influence'?

1993. Undue influence, for the purpose of § 1992, means influence of such a nature that the volition of the testator is subjected to the coercion or domination of another person.^(a) There is no presumption of undue influence from the situation of the parties, or from the fact that the party alleged to have exercised undue influence benefited under the testament.^(b)

- (a) *Parfitt v. Lawless* (1876) L. R. 2 P. & M. 462.
Wingrove v. Wingrove, ubi sup.
Baudains v. Richardson, ubi sup.

[This requirement distinguishes 'undue influence' as it affects testaments, from a similar defect as it applies to transactions *inter vivos* (*ante*, Bk. I, Sect. III, Tit. II, §§ 81, 84, 85).]

(b) *Boyse v. Rossborough* (1857) 6 H. L. C., at p. 49, *per* Lord Cranworth.

Parfitt v. Lawless, *ubi sup.*

Spiers v. English [1907] P., at p. 24.

[In this respect also the rule is different from that applying to transactions *inter vivos*. But if circumstances arouse the suspicion of the Court, the persons setting up the instrument must prove affirmatively, that the testator knew and approved of its contents (*Barry v. Butlin* (1838) 2 Moo. P. C. 480; *Tyrrell v. Painton* [1894] P. 151).]

1994. All persons, whether minors or not, are competent to attest the execution of a testament, if they understand the act which they are performing.^(a) But if any witness attests the execution of a testament, to whom, or to whose wife or husband, any beneficial interest in property is given by the testament which such witness attests, the gift to him or her, or to his or her wife or husband, or to any persons claiming under them, is void ; ^{Competency of witness} ^(b) unless the testament did not require attestation.^(c)

(a) *Hudson v. Parker* (1844) 1 Rob., at pp. 35, 36.

(b) Wills Act, 1837, s. 15.

Creswell v. Creswell (1868) L. R. 6 Eq. 69.

Re Fleetwood (1880) 15 Ch. D. 594.

(c) *Re Limond* [1915] 2 Ch. 240 (military will).

[If there is a testament with codicils, and a witness has attested the execution of only one of those instruments, he or she, or his or her wife or husband, may take a gift under any of such instruments the execution of which he or she has not attested ; although it confirms or republishes the instrument which he or she has attested (*Tempest v. Tempest* (1856) 2 K. & J. 642; *Anderson v. Anderson*

(1872) L. R. 13 Eq. 381; *Trotter v. Trotter* [1899] 1 Ch. 764). A charge or direction for the payment of debts is not a gift for the purposes of this § (Wills Act, 1837, s. 16). If a testament is apparently attested by more than two persons, and a legacy is bequeathed by it to one of them, the latter can take the legacy, if it can be proved that he did not sign as a witness (*Randfield v. Randfield* (1860) 30 L. J. Ch. 179 n.). If, after the execution of the testament, an attesting witness marries a legatee or devisee, the legacy or devise is not thereby invalidated (*Thorpe v. Bestwick* (1881) 6 Q. B. D. 311); and a supervening incompetency in a witness does not render a previous attestation invalid (Wills Act, 1837, s. 14). The fact that a person is appointed executor by a testament does not render him incompetent to be admitted a witness to prove its execution, or its validity or invalidity (Wills Act, 1837, s. 17).]

TITLE IV—DEVISES, LEGACIES, AND DONATIONES MORTIS CAUSA

1995. A person may by his testament devise all the real and bequeath all the personal property to which he is entitled at the time of his death, and which, on his death, passes to his personal representative, as such, or which, if not so devised or bequeathed, would pass to his customary heir general. *Power of disposition*

Wills Act, 1837, s. 3.

Land Transfer Act, 1897, s. 1.

[Ss. 4 and 5 of the Wills Act, 1837, provide for the payment of the fees due by the custom of the manor in the case of the devise of copyhold or customary freehold, for the entry of such testaments on the court rolls, and, where such lands were not devisable before this Act, for the payment by the devisee of the same fees as the customary heir was liable to pay. Despite the general words of s. 1 of the Land Transfer Act, 1897, it is generally assumed that estates tail and quasi-tail do not pass to the personal representatives of a deceased tenant; and, in some cases, claims in Tort, not prosecuted to judgment, are destroyed by the death of the claimant (*ante*, Bk. II, Pt. III, Sect. I, Tit. VI, § 786). A joint interest passes to survivors, not to the representatives of a deceased owner. It cannot be affected by the testament of the latter (*ante*, Bk. III, Sect. XVI, §§ 1753-1756). A direct disposition of real estate by testament is known as a 'devise'; a similar disposition of personal estate as a 'legacy' or 'bequest.']

1996. Every testament is construed with reference to the dispositions of real and personal property contained in it, to speak and take effect as if it had been *Will speaks from death*

executed immediately before the death of the testator; unless a contrary intention appears by the testament.^(a) Such a contrary intention will appear if the date of the testament, as contrasted with the date of the testator's death, is clearly referred to as governing the extent of the disposition,^(b) or if the subject-matter of the disposition is specifically described as belonging to the testator at the date of the testament.^(c)

(a) Wills Act, 1837, s. 24.

Lady Langdale v. Briggs (1856) 2 Jur. N. S., at p. 996, *per* Turner, L. J.

(b) *Cole v. Scott* (1849) 1 Mac. & G. 518.

In re Ord (1879) 12 Ch. D., at p. 25, *per* Baggallay, L. J.

(c) *Emuss v. Smith* (1848) 2 De G. & Sm. 722.

Re Portal and Lamb (1885) 30 Ch. D. 50.

[Difficult questions sometimes arise in the case of a legacy of stocks and shares, where one company has amalgamated with another, or has reconstructed, or has subdivided its original shares, or converted them into stock. (See, e. g. *Re Clifford* [1912] 1 Ch. 29; *Re Leeming*, *ibid.*, 828.)]

*Insufficient
description
of beneficiary*

1997. If either the subject-matter of,^(a) or (subject to Bk. III, Sect. XVII, Tit. I, § 1766, *ante*) the persons to be benefited^(b) by, a devise or a legacy, is or are not sufficiently described, the devise or legacy is void for uncertainty. But if there is a devise or a legacy to such of a number or class of persons, or in such proportions, as a person named by the testator shall appoint, without a gift over in default of appointment, and the power is in the nature of a trust in favour of the objects of the power, the fact that no

appointment is made will not cause the gift to fail for uncertainty; but the property will be divided equally among the objects of the power.^(c)

(a) *Jubber v. Jubber* (1839) 9 Sim. 503.

(b) *Lowndes v. Stone* (1797) 4 Ves. 649.

(c) *Brown v. Higgs* (1803) 8 Ves., at p. 574.

In re Weekes' Settlement [1897] 1 Ch. 289.

[It has been judicially held that a devise may even be implied, if necessary to prevent defeat of the testator's obvious intention, e.g., under a devise to A (the testator's heir) "after the death of B," B will take a life estate, to avoid defeating the intention of the testator, which was, obviously, that A should not take the land until B's death (*Manning v. Andrews* (1576) 1 Leon. 256; *Pybus v. Mitford* (1674) 1 Vent. 376).]

1998. A specific legacy is a gift of some piece of personal estate which a testator, identifying it by a sufficient description, and manifesting an intention that it shall be enjoyed or taken in the state and condition indicated by that description, separates from the general mass of his personal estate. A general legacy is a gift of personal estate not particularly described and identified, and not specially separated from the body of the estate.

Specific and general legacies

Bothamley v. Sherson (1875) L. R. 20 Eq., at pp. 308, 309, per Jessel, M. R.

Robertson v. Broadbent (1883) L. R. 8 App. Ca., at p. 815, per Lord Selborne, C.

1999. A specific legacy is revoked by ademption if, at the testator's death, the property bequeathed has ceased to exist,^(a) or is not the property of the testator,^(b) or has changed its form so that it no longer answers to the description of it in the testament,^(c) or has permanently changed its locality when the locality is an essential part of its description,^(d) or has been other-

Ademption of specific legacies

wise bequeathed by a later clause in the same testament or in a codicil thereto.^(e) A partial destruction^(f) or different disposition^(g) revokes the legacy *pro tanto*.

(a) *Asbburner v. Macguire* (1786) 2 Bro. C. C. 336.

In re Bridle (1879) 4 C. P. D. 336.

(b) *Asbburner v. Macguire*, *ubi sup.*

(c) *In re Lane* (1880) 14 Ch. D. 856.

In re Gray (1887) 36 Ch. D. 205.

Re Slater [1907] 1 Ch. 665.

(d) *Chapman v. Hart* (1749) 1 Ves. Sen. 273.

Colleton v. Garth (1833) 6 Sim. 19.

Re Johnston (1884) 26 Ch. D., at p. 553.

(e) *Kermode v. McDonald* (1868) L. R. 3 Ch. App. 584.

[The fact that the substituted disposition fails to take effect, e. g. by reason of lapse, does not prevent it operating as an ademption of the original bequest (Wills Act, 1837, s. 22).]

(f) *Asbburner v. Macguire*, *ubi sup.*

(g) *Ibid.*

[The doctrine of ademption applies to gifts made under a testamentary power of appointment, whether the power be general or special (*In re Dowsett* [1901] 1 Ch. 398; *In re Moses* [1902] 1 Ch. 100).]

*Acts of
strangers*

2000. A change in the character of the property bequeathed, made by a third person without the knowledge, and against the wishes, of the testator, will not cause the legacy to be adeemed.^(a) But the fact that the change has been effected by a public authority will not prevent ademption taking place.^(b)

(a) *Shaftesbury v. Shaftesbury* (1716) 2 Vern. 748.

Jenkins v. Jones (1866) L. R. 2 Eq. 323.

(b) *In re Slater* [1907] 1 Ch. 665.

*All devises
specific*

2001. Devises, including residuary and other general devises,^(a) are, for the purposes of §§ 1999 and

2000, *ante*, treated as specific legacies, and are subject to the same rules in the administration of the estate.^(b)

- (a) *Hensman v. Fryer* (1867) L. R. 3 Ch. App. 420.
Lancefield v. Iggulden (1874) L. R. 10 Ch. App. 136.

[The following instances of a general devise are given by the Wills Act, 1837, ss. 26 and 27:—‘a devise of the real estate of the testator, or of the real estate of testator in any place, or in the occupation of any person mentioned in the will, or otherwise described in a general manner.’ A specific devise has been judicially described as a devise of property intended to be separated by the testator as between the objects of his bounty from the rest of his property (*Spong v. Spong* (1829) 3 Bligh, N. S., at p. 105, *per* Lord Mannors). Any devise which is not specific is general; and a devise of ‘land’ includes leaseholds and copyholds, unless a contrary intention appears by the testament (Wills Act, 1837, s. 26). *Quære*: whether this s. applies to devises of ‘real estate’ (*Guyton & Rosenberg’s C.* [1901] 2 Ch. 591).]

- (b) *Bothamley v. Sherson* (1875) L. R. 20 Eq., at p. 312, *per* Jessel, M. R.

[The reason for the rule that a residuary devise is treated as specific is historical. Before the Wills Act, 1837, s. 24, a devise only passed the real estate which the testator had at the making of the testament. It followed, therefore, that every devise must be specific; because it operated only upon the specific real estate belonging to the testator when it was made. The cases cited decided, somewhat illogically, that, though by the Wills Act a testament now operates upon all the testator’s real estate belonging to him at death, this consequence of the old state of the law still remained. It should be noted, however, that a charge of debts or legacies on real estate is satisfied (as between the persons entitled to such real estate) primarily out of the residuary devise (*Conron v. Conron* (1858) 7 H. L. C. 168).]

2002. If a testator’s assets are not sufficient for the payment of the general legacies bequeathed by *Abatement of legacies*

his testament, the general legacies will abate, and, in the absence of a contrary direction by the testator,^(a) abate rateably.^(b) But if a general legacy is given to a wife in exchange for the abandonment by her of an enforceable claim to dower,^(c) or (possibly) to a creditor to whom a debt is owing exceeding the amount of the legacy and in consideration of the abandonment of the debt,^(d) it has priority over other general legacies.

- (a) *Lewin v. Lewin* (1752) 2 Ves. Sen. 415.
In re Hardy (1881) 17 Ch. D. 798.

[But a direction to pay a legacy to a testator's widow within three months of his death does not amount to a direction to the contrary; and such legacy will abate rateably with the other general legacies, if there is a deficiency of assets (*In re Schweder* [1891] 3 Ch. 44).]

- (b) *Barton v. Cooke* (1800) 5 Ves., at p. 464.

[If a legacy is given free of legacy duty, the duty payable is treated as an additional legacy and added to the legacy for the purpose of reckoning the amount of the abatement (*In re Turnbull* [1905] 1 Ch. 726).]

- (c) Dower Act, 1833, s. 12.
Re Greenwood [1892] 2 Ch. 295.
 (d) *Re Whitehead* [1913] 2 Ch., at p. 59, *per* Farwell, L. J.

*Demon-
strative
legacies*

2003. A general legacy which the testator directs to be paid out of a particular fund indicated by him is called a 'demonstrative' legacy.^(a) So long as such particular fund lasts, the legacy is treated as specific; but if the fund has been wholly or partially ex-

hausted during the testator's lifetime, the legacy ranks wholly or to that extent as a general legacy.^(b)

- (a) *Paget v. Huish* (1863) 1 H. & M., at p. 671.
- (b) *Robinson v. Geldard* (1852) 3 M. & G., at p. 745.
Sellon v. Watts (1861) 9 W. R. 847.

2004. A residuary devise or bequest includes all property comprised or intended to be comprised in any other devise or bequest contained in the testament, which has failed to take effect.^(a) None of such property is excluded unless it is specifically excepted by the testament.^(b)

*Residuary
devises and
bequests*

- (a) Wills Act, 1837, s. 25.
Cambridge v. Rous (1802) 8 Ves., at p. 25, *per* Grant, M. R.
Blight v. Hartnoll (1883) 23 Ch. D. 218.
Re Mason [1901] 1 Ch., at p. 632, *per* Vaughan Williams, L. J.
- (b) *In Re Bagot* [1893] 3 Ch. 348.
In re Fraser [1904] 1 Ch. 726.

[It is possible in a testament to have two good residuary devises, one of freeholds and the other of copyholds; and s. 25 of the Wills Act, 1837, is applicable to both (*Re Mason, ubi sup.*). Lapsed shares of residue do not fall into residue (*Green v. Pertwee* (1846) 5 Hare, 249); unless the testator shows an intention to that effect (*Re Palmer* [1893] 3 Ch. 369; *Re Parker* [1901] 1 Ch. 408), or unless the residuary beneficiaries take as joint owners (*Webster v. Webster* (1726) 2 P. Wms. 347).]

2005. Until the personal representative has as-
sented to a devise or legacy, the devisee or legatee
(even if the devise or legacy is vested) has only a
right to administration of the estate and transfer or
payment of the subject-matter of the devise or legacy

*Title of
beneficiary*

in due course.^(a) When the personal representative has assented, a devisee or specific legatee has a legal or equitable right (vested or contingent as the case may be) to the subject-matter of the devise or legacy, as from the death of the testator, and can enforce such right against the personal representative and third parties.^(b) But no direct action to recover a general legacy lies against the personal representative, even after assent.^(c)

(a) Bl. *Comm.* II, 512.

(b) *Saunders' Case* (1599) 5 Rep., at fo. 12 b.
Re West [1909] 2 Ch., at p. 185, *per* Swinfen Eady, J.

(c) *Deeks v. Strutt* (1794) 5 T. R. 690.
Jones v. Tanner (1827) 7 B. & C. 542.
Re West, ubi sup., at p. 186.

[The assent of the personal representative, which (except in certain cases, e. g. of a devise of registered land (Land Transfer Act, 1897, s. 3 (4)), may be in any form, and express or implied (*Mason v. Farnell* (1844) 12 M. & W., at pp. 681-2), may be compelled after the expiry of a year from the testator's decease; unless the personal representative can show good cause for withholding it (Land Transfer Act, 1897, s. 3 (2); *Brooke v. Lewis* (1822) 6 Madd. 358). The assent of one of several representatives is sufficient in the case of a legacy (*Townson v. Tickell* (1819) 3 B. & Ald., at p. 40); but the assent of all the representatives who prove the testament, or an Order of the Court, is necessary to vest devised real estate in the devisee (Land Transfer Act, 1897, s. 3 (1); Conveyancing Act, 1911, s. 12). A representative who assents to a devise or a legacy (including a legacy of ascertained residue) made or given to himself upon trust, becomes a trustee of the property comprised in it (*Dix v. Burford* (1854) 19 Beav. 409; *Re Smith* (1889) 42 Ch. D. 302).]

Conditional
assent of rep-
resentative

2006. The assent of the representative may be made subject to a condition subsequent, if the con-

dition is within the powers of the representative to impose as the administrator of the assets.^(a) When once an unconditional assent has been voluntarily given, it cannot be retracted; ^(b) but a payment made by a personal representative to a legatee without notice of an existing debt due from the estate, may be recovered by the representative, to the extent of the debt.^(c)

(a) *Elliott v. Elliott* (1841) 9 M. & W., at p. 28, *per* Parke, B.

[An assent to a devise of real estate may be made subject to a charge for the payment of any money which the representative is liable to pay (Land Transfer Act, 1897, s. 3 (ii)); but the property itself cannot be made subject to a charge for debts for which, before the Act, the personal representatives would not have been liable (*Re Cary's and Lott's Contract* [1901] 2 Ch. 463).]

(b) *Noell v. Robinson* (1682) 1 Vern. 90.

Newman v. Barton (1690) 2 Vern. 205.

(c) *Fervis v. Wolferstan* (1874) L. R. 18 Eq. 18.

[This case and *Whittaker v. Kershaw* (1890) 45 Ch. D. 320, show that the executor can also recover if he pays with notice of a liability which has not yet become a debt.]

2007. The devisee or legatee, even of a vested devise or legacy, cannot compel the representative to assent or to make a conveyance or payment until a year after the testator's death;^(a) even though a provision to the contrary is contained in the testament.^(b) But the representative may, if he thinks fit, assent, convey, or pay, before that time.^(c)

Assent cannot be compelled for a year

- (a) Land Transfer Act, 1897, s. 3 (2).
Wood v. Penoyre (1807) 13 Ves., at pp. 333, 334.
Benson v. Maude (1821) 6 Madd. 15.

[Presumably, as a contingent devisee or legatee has no right to his devise or legacy till the contingency is fulfilled, he cannot, before that event, compel the executor to assent.]

- (b) *Brooke v. Lewis* (1822) *ibid.*, 358.
 (c) *Angerstein v. Martin* (1823) Turn. & Russ., at p. 241.

*Interest on
 legacy for
 life*

2008. If a general legacy is bequeathed for life, with remainder over, interest does not begin to accrue in favour of the life tenant, till the end of a year from the testator's death.

Gibson v. Bott (1802) 7 Ves., at p. 96.

[The reason assigned by Lord Eldon is, that it is only the interest of the legacy which is given to the tenant for life; and, as the legacy is not payable till a year from the death, no interest can accrue until that date. In the case of a general legacy bequeathed to legatees in succession, the capital is usually vested in trustees (*ante*, Bk. III, Sect. IX, Tit. I, § 1540 (1)); but a specific legacy may be vested legally in the life owner, with an executory limitation over on his death (*ibid.*, § 1540 (2)). In such a case, the life-owner is a quasi-trustee of the interest of the remainderman, and will be responsible for unexplained loss or damage (*Re Swan* [1915] 1 Ch. 829).]

*Income of
 devise or
 specific
 legacy*

2009. A vested devisee or specific legatee is entitled to all the profits accruing from the property devised or bequeathed, as from the testator's death,^(a) and is (*semble*) chargeable with the cost of its upkeep, care, and preservation, as from that date.^(b) But if the devise or legacy is contingent, the accretions, pending the contingency, fall into residue;^(c) unless,

in the case of personalty, the testator directs the specific fund to be set apart and invested for the benefit of the legatee.^(d)

- (a) *Re Pearce* [1909] 1 Ch. 819.
- (b) Contrary rules as to this are laid down by *Re Pearce, ubi sup.*, and *Sharp v. Lush* (1879) 10 Ch. D., at p. 472.
- (c) *Hodgson v. E. of Bective* (1863) 1 H. & M. 376.
Guthrie v. Walrond (1883) 22 Ch. D., at p. 578.
- (d) *Re Woodin* [1895] 2 Ch., at pp. 314, 315.

[Of course the rule stated in the latter part of this § applies only to devises and legacies which are contingent on the happening of conditions precedent (*ante*, Bk. I, Sect. III, Tit. III, § 110). A devise or legacy which is actually vested is, though liable to be divested by the happening of a subsequent contingency, not a contingent devise or legacy for the purposes of this § (*Re Buckley* (1883) 22 Ch. D. 583). The income of real estate cannot be suspended during a contingency, for that would virtually involve an abeyance of the freehold; and, even in the case of personalty, suspension cannot be beyond the period allowed for accumulation (Bk. III, Sect. XV, Tit. IV, § 1739; *C. of Bective v. Hodgson* (1864) 10 H. L. C., at pp. 664, 665, *per* Lord Westbury, C.).]

2010. Subject to the provisions of § 2011, *post*, a general legatee is not entitled to interest on his legacy as from the testator's death.^(a) But if no time is fixed for the payment of the legacy, interest at four *per cent.*^(b) is payable on a vested general legacy as from a year from the testator's death^(c) until payment of the legacy;^(d) even though the legacy is payable out of a reversionary interest.^(e) If a time has been fixed by the testator for payment of the legacy, interest is payable from that date.^(f)

*Income of
general
legacy*

- (a) *Benson v. Maude* (1821) 6 Madd. 15
- (b) R. S. C. Order LV, R. 64.
Re Davey [1908] 1 Ch. 61.
- (c) *Hearle v. Greenbank* (1749) 3 Atk., at p. 716.
- (d) *Lord v. Lord* (1867) L. R. 2 Ch. App., at p. 789, *per* Lord Cairns.
- (e) *Walford v. Walford* [1912] A. C. 658.
- (f) *Heath v. Perry* (1744) 3 Atk., at p. 102, *per* Lord Hardwicke, C.
Crickett v. Dolby (1795) 3 Ves. 10.
Festing v. Allen (1842) 5 Ha. 573.

*Exceptional
cases*

2011. Interest is payable to the legatee on a vested general legacy from the death of the testator: —

- (i) if the legacy is given in satisfaction of a debt; *or*,

Clark v. Sewell (1744) 3 Atk., at p. 99.

- (ii) if the legacy is given to a minor to whom the testator stood *in loco parentis*; *or*,

Beckford v. Tobin (1749) 1 Ves. Sen., at p. 310, *per* Lord Hardwicke, C.
Wilson v. Maddison (1843) 2 Y. & Coll. C. C. 372.

- (iii) if the legacy is charged upon land.

Pearson v. Pearson (1802) 1 Sch. & Lef., at p. 11, *per* Lord Redesdale, C.

[This last rule does not apply when there is a direction to convert the realty at the testator's death and pay the legacies from the proceeds (*Turner v. Buck* (1874) L. R. 18 Eq. 301); it does apply when the direction is to convert and pay the legacies from the proceeds after the death of a tenant for life (*In re Waters* (1889) 42 Ch. D. 517). As to interest on contingent legacies, see *ante*, Bk. III, Sect. XVII, Tit. IV, § 1809, n.]

*Arrears of
interest*

2012. A legatee cannot recover more than six years' arrears of interest; whether or not his legacy

is charged upon land or rent, or secured by an express trust.^(a) But, if the legacy is payable out of a reversionary interest which cannot be realized, the legatee is entitled, when the reversion falls in, to interest as from the date at which the legacy was *primâ facie* payable.^(b)

(a) Real Property Limitation Act, 1833, s. 42.

Real Property Limitation Act, 1874, s. 10.

(b) *Re Blachford* (1884) 27 Ch. D. 676.

[As to the period after which an action to recover a devise or a legacy is barred, see *ante*, Bk. I, Sect. V, § 159; and as to the period of limitation for an annuity, see *ante*, Bk. III, Sect. XIII, Tit. III, § 1633.]

2013. In a devise or bequest, the words ‘die without issue’ or ‘die without leaving issue,’ or ‘have no issue,’ or other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, are construed to mean a want or failure of issue in the lifetime, or at the time of the death, of such person; unless a contrary intention appears by the testament, by reason of an estate tail being devised to such person, or otherwise. But this rule does not apply to cases where these words import if no issue described in a preceding gift be born, or if there are no issue who obtain a vested estate by a preceding gift to such issue.

‘Die
without
issue’

Wills Act, 1837, s. 29.

[Before the Act, a devisee in such cases took an estate tail with a remainder over. Now he takes an estate in fee simple with an executory limitation over if he leaves no issue at his death. Such executory limitation over, as well as a similar limitation after a bequest of leaseholds, if taking effect since 1882, will be void so soon as any issue of the class on whose failure the limitation over is to take effect attain twenty-one (Conveyancing Act, 1882, s. 10). The rule stated in the text has long applied to bequests of personalty, including leaseholds (*Target v. Gaunt* (1718) 1 P. Wms. 432; *Forth v. Chapman* (1720) *ibid.*, 663).]

Presumption that gifts confined to legitimate relations

2014. When there is a devise or bequest to children or other relations, only those who are legitimate can take;^(a) unless the words of the testament,^(b) or the circumstances under which the testator made the gift,^(c) show that he meant to benefit persons who are illegitimate.

(a) *Wilkinson v. Adam* (1813) 1 V. & B., at p. 462.

(b) *Ibid.*, at p. 447.

(c) *Woodhouselee v. Dalrymple* (1817) 2 Mer. 419.

In re Eve [1909] 1 Ch. 796.

[Where the person to whose 'children' there is a gift, even of English real estate, was domiciled at the time of his marriage in a country by the law of which his *ante-nati* became legitimate by his marriage, such *ante-nati* can take under the gift (*Re Grey's Trusts* [1892] 3 Ch. 88).]

Presumption against double legacies

2015. If a testator has twice bequeathed a legacy to the same person, and there is no evidence on the face of the testament as to whether he intended the later legacy to be a substitute for or an addition to the prior legacy, the later legacy is presumed to be a substitute for the prior legacy:—

- (i) if the same specific object is bequeathed, either in the same testament or in the testament and a codicil thereto; *or*
Suisse v. Lowther (1843) 2 Ha., at p. 432.
- (ii) if two pecuniary legacies of equal amount are bequeathed in the same instrument; *or*
Manning v. Thesiger (1835) 3 My. & K. 29.
- (iii) if two pecuniary legacies of equal amount are bequeathed in different instruments for the same reason.
Hurst v. Beach (1819) 5 Madd., at p. 358.

2016. If a testator has twice bequeathed a legacy to the same person, and there is no evidence on the face of the testament as to whether he intended the later legacy to be a substitute for or an addition to the prior legacy, the later legacy is presumed to be an addition to the prior legacy:—

- (i) if two pecuniary legacies of unequal amount are bequeathed in the same or in different instruments; *or*
Yockney v. Hansard (1844) 3 Ha., at p. 622, *per* Wigram, V. C.
Lee v. Pain (1845) 4 Ha., at p. 216.
- (ii) if two pecuniary legacies, of equal amount, are bequeathed by different instruments without the same reason being given for both.

Hurst v. Beach, *ubi sup.*
Lee v. Pain, *ubi sup.*

*Presump-
tion in
favour of
double
legacies*

*Debtor
legatee*

2017. If a person who is entitled to a general legacy, a specific legacy of a sum of money, or a share of residue, owes a debt to the deceased which is immediately payable, neither he, nor any person claiming through him,^(a) can claim what is due to him from the deceased's estate, until he has brought into account the sum which he owes to the deceased.^(b) The fact that the debt is statute-barred will not prevent the application of this rule.^(c)

(a) *Re Knapman* (1880) 18 Ch. D. 300.

(b) *Cherry v. Boulton* (1839) 4 My. & Cr. 442.
Re Taylor [1894] 1 Ch. 671.
Re Abrahams [1908] 2 Ch. 69.

[But the rule does not apply where the beneficiary owes the debt solely in his capacity as executor for another person (*Re Bruce* [1908] 2 Ch. 682). The appointment of his debtor as executor was held at law to imply a release by the testator of the executor's debt (*Re Applebee* [1891] 3 Ch., at p. 429). But the equitable rule, that the matter is one of construction, is now followed; and the presumption is against an implied release, though, in accordance with the general principle, evidence to rebut the presumption will be admitted (*Re Applebee*, *ubi sup.*; *Re Pink* [1912] 1 Ch. 529).]

(c) *Courtenay v. Williams* (1844) 3 Ha. 539.
In re Akerman [1891] 3 Ch. 212.

[In this last case Kekewich, J., (pp. 217-8) expressly excepted all specific bequests from the operation of the rule.]

*Debtor
devisee*

2018. The provisions of § 2017 have no application to an heir,^(a) a devisee,^(b) a specific legatee of leaseholds or chattels,^(c) or a legatee whose legacy has been appropriated to him by the executor.^(d)

- (a) *In re Milnes* (1885) 53 L. T. 534.
- (b) *In re Akerman* [1891] 3 Ch. 212.
- (c) *In re Akerman, ubi sup.*
In re Taylor [1894] 1 Ch. 671.
- (d) *Ballard v. Marsden* (1880) 14 Ch. D. 374.

[An appropriation of a legacy is a setting aside by the executor, with the consent of the legatee, of a specific part of the testator's estate to satisfy a pecuniary legacy. As to this, see *post*, Sect. III, Tit. VII.]

2019. A person proved to have caused the death of the testator by an act which is a criminal offence cannot claim any benefit under the testament. *Beneficiary causing testator's death*

Cleaver v. Mutual Reserve Fund Life Association [1892] 1 Q. B. 147 (murder).

Estate of Crippen [1911] P., at p. 112 (murder).

Estate of Hall [1914] P. 1 (manslaughter).

[It has been judicially suggested in Canada that if the testament were made in favour of the criminal between commission of the criminal act and the death of the testator, the criminal could take (*Lundy v. Lundy* (1895) 24 Can. S. C., at p. 653). And the act of a lunatic is not a criminal offence for the purposes of the rule in the text (*Re Houghton* (1915) XXXI T. L. R. 427).]

2020. Where there are two distinct gifts by the same testator to the same person, one onerous and the other beneficial, the donee may disclaim the onerous gift and take the beneficial; but if the onerous and the beneficial property are included in the same gift, the donee must, *primâ facie*, take the whole or none. *Right to accept and reject*

Re Baron Kensington [1902] 1 Ch., at p. 207, *per* Farwell, J.

Douglas Menzies v. Umpheby [1908] A. C. 224.

*Gift of
beneficiary's
property*

2021. If a testator gives to a devisee or legatee^(a) any part of his (the testator's) own property, or makes a valid^(b) disposition in his favour of property over which the testator has a power of appointment,^(c) and also professes to give to another person property belonging at the time of the testator's death to the devisee, legatee, or appointee, the devisee, legatee, or appointee must elect whether he will take under the testament or against it^(d) (see *post*, § 2022). The facts that the testator was ignorant that the property of which he was purporting to dispose belonged to the devisee, legatee, or appointee,^(e) or that he did not intend to put the devisee, legatee, or appointee, to his election,^(f) will not prevent the application of this rule; but the rule will not apply unless it is clear that the testator intended to dispose of property which in fact belonged to the devisee, legatee, or appointee, at the testator's death.^(g)

(a) *Cooper v. Cooper* (1870) L. R. 6 Ch. App., at p. 21, *per* James, L. J.

(b) *In re Oliver's Settlement* [1905] 1 Ch. 191.
In re Nash [1910] 1 Ch., at pp. 10, 11.

(c) *Whistler v. Webster* (1794) 2 Ves. Jr. 367.

(d) *Ker v. Wauchope* (1819) 1 Bligh, at pp. 25, 26, *per* Lord Eldon, C.

(e) *Wollaston v. King* (1869) L. R. 8 Eq., at p. 173.

(f) *Cooper v. Cooper* (1874) L. R. 7 H. L., at p. 67.

(g) *Wintour v. Clifton* (1856) 8 De G. M. & G., at p. 650.
Re Coole [1920] 2 Ch. 536.

[The doctrine of Election arises chiefly in cases of dispositions by testament; but it may also arise under deeds and contracts (see *Codrington v. Lindsay* (1872) L. R. 8 Ch. App., at p. 587). To raise a case of election, it is necessary that the intended gift of A's property to B should be such that, if the property had belonged to the intending donor, the gift would have been valid (*Re Wright*

[1906] 2 Ch. 288, overruling *Re Bradshaw* [1902] 1 Ch. 436). And persons taking in default of valid appointment a share of a fund of which the appointor has appointed part to them under a limited power cannot be compelled to compensate, out of such part, the persons to whom the share was invalidly appointed; because such share was not the appointor's own property (*Bristow v. Warde* (1794) 2 Ves. Jr. 336). Finally, if a testator professes to give to A, property of which B has no power to dispose, no case of election will be thereby raised against B (*Re Lord Chesham* (1886) 31 Ch. D. 466).]

2022. If the devisee, legatee, or appointee, elects *Election* to take under the testament, he must give up to the other beneficiary his own property which has been devised or bequeathed to such beneficiary.^(a) If he elects to take against the testament, he must compensate the other beneficiary out of the property thereby devised, bequeathed, or appointed to himself.^(b) The amount of the compensation is to be ascertained as at the testator's death.^(c)

(a) *Gretton v. Haward* (1819) 1 Swanst., at p. 420.

(b) *Ibid.*, at p. 424.

Pickersgill v. Rodger (1877) 5 Ch. D., at p. 173, *per* Jessel, M. R.

(c) *Re Hancock* [1905] 1 Ch. 16.

Re Williams (1914) 110 L. T. 569.

[In order to give effect to these rules, the Court will order the beneficiary put to his election to convey his own property to the disappointed beneficiary, or will vest the property devised or bequeathed to the electing beneficiary in the disappointed beneficiary, as the case may be (see Seton, *Forms of Judgments* (7th ed.) II, pp. 1527, 1528).]

2023. A person put to his election is entitled to *Terms of election* full information as to the value of the benefit con-

T T

ferred on him by the testator.^(a) He may be ordered by the Court to elect within a specified time; and, if he does not do so, he will be presumed to have elected to take against the testament.^(b)

(a) *Whistler v. Webster* (1794) 2 Ves., at p. 371.

(b) *Gretton v. Haward* (1818) 1 Swanst., at pp. 447, 448.

*Implied
election*

2024. An election for the purposes of § 2022 may be express; or it may be implied from acts done by the person required to make the election, if he knows that he has been put to his election.

Spread v. Morgan (1864-65) 11 H. L. C., at pp. 602, 613.

*Persons
under
incapacity*

2025. A married woman cannot be put to her election, if the effect would be that the exercise of such election might deprive her of property which she is restrained from alienating (*ante*, Bk. I, Sect. III, Tit. II, §§ 105-108).^(a) A lunatic or a minor may be put to his election. But, in the case of a lunatic, the choice is made by his committee or quasi-committee, acting under the direction of the Court;^(b) and, in the case of a minor, the Court will elect for him.^(c)

(a) *Re Vardon's Trusts* (1885) 31 Ch. D. 275.

[It has been held (*Haynes v. Foster* [1901] 1 Ch. 361) that this rule applies even where an attempted restraint is not operative; e. g. because the woman has not yet married, or has ceased to be married. But the most recent decisions are against this view (*Re Tongue* [1915] 1 Ch. 390; *Re Hargrove, ibid.*, 398).]

- (b) Lunacy Act, 1908, s. 1.
Re Earl of Sefton [1898] 2 Ch. 378.
(c) *Re Montagu* [1896] 1 Ch., at p. 552.

2026. If a legacy is bequeathed to a creditor of the testator, of an amount equal to or greater than the debt due from the testator, there is a presumption that the legacy is intended by the testator to satisfy the debt; and the creditor will be bound to elect whether he will claim the debt or the legacy.^(a) But this presumption does not arise — (i) if a declaration to the contrary appears in the testament; ^{Satisfaction of debts by legacies} (b) *or* (ii) if the debt is incurred after the execution of the testament; ^(c) *or* (iii) if the legacy is of less amount than the debt, ^(d) *or* of an uncertain amount; ^(e) *or* (iv) if the legacy is payable at a later period than the debt, ^(f) *or* is contingent; ^(g) *or* (v) if there is a direction in the testament that the testator's debts shall be paid. ^(h) And the presumption does not arise when a testator devises real estate to a creditor.⁽ⁱ⁾

- (a) *Talbot v. Duke of Shrewsbury* (1714) Prec. Ch. 394.
Barret v. Beckford (1750) 1 Ves. Sen. 519.
Williamson v. Naylor (1834) 3 Y. & Coll. Exch., at p. 210 n.
(b) *Wallace v. Pomfret* (1805) 11 Ves. 542.
(c) *Thomas v. Bennet* (1725) 2 P. Wms., at p. 343.
(d) *Thynne v. Glengall* (1848) 2 H. L. C., at p. 153.
(e) *Ibid.*, at p. 154.
(f) *In re Horlock* [1895] 1 Ch. 516.

[But in favour of the presumption a general legacy to a creditor will be deemed to be payable at the testator's decease; unless a contrary intention appears by the will (*Re Rattenbury* [1906] 1 Ch. 667).]

- (g) *Crichton v. Crichton* [1895] 2 Ch. 853.
- (h) *Richardson v. Greese* (1743) 3 Atk. 65.
Re Huisb (1889) 43 Ch. D. 260.
- (i) *Eastwood v. Vinke* (1731) 2 P. Wms. 613.

[It is probable also that the presumption does not arise in the case of a legacy of a specific chattel; but there appears to be no decision on the point.]

*Ademption
of portions
legacies*

2027. If a father, or other person who has placed himself *in loco parentis* to a child,^(a) gives by his testament a legacy or share of residue by way of portion to such child^(a) and, subsequently, during his lifetime, advances or covenants to advance a portion^(b) to or for the benefit of such child, whether or not of an amount equal to the testamentary provision, and whether or not it is settled in the same way, there is a presumption that the testamentary gift is adeemed, (i. e. revoked), wholly or *pro tanto*; ^(c) and, in the case of a covenant to advance a portion, this presumption is not rebutted merely by a direction in the testament that the testator's debts shall be paid.^(d)

- (a) *Ex parte Pye* (1811) 18 Ves. 140.
Montefiore v. Guedalla (1859) 1 De G. F. & J. 93.
In re Ashton [1897] 2 Ch., at p. 577-8. (If it is contended that the mother is *in loco parentis* for the purposes of this presumption, the burden of proof is on those who put forward the contention (*ibid.*, at p. 578).)

[A devise of real estate is not a portion for this purpose (*Davys v. Boucher* (1839) 3 Y. & Coll. Exch. 397).]

- (b) *Taylor v. Taylor* (1875) L. R. 20 Eq. 155.
Re Scott [1903] 1 Ch. 1.

[These two cases show that a payment made by a father to a child is not a portion unless it is made to establish the child per-

1

manently in life. But a legacy given by a father is, *primâ facie*, a portion (*Ex parte Pye, ubi sup.*, at p. 153).]

(c) *Ex parte Pye, ubi sup.*

Durham v. Wharton (1836) 3 Cl. & Fin., at pp. 154-6.

Pym v. Lockyer (1841) 5 My. & Cr. 29.

Hopwood v. Hopwood (1859) 7 H. L. C., at p. 747.

[The rule applies equally to testamentary appointments (*Re Peel's Settlement* [1911] 2 Ch. 164).]

(d) *Cooper v. Macdonald* (1873) L. R. 16 Eq., at pp. 267, 268.

[In the case of portions-legacies, the claim of ademption can only be raised in favour of other persons to whom the testator stood *in loco parentis* (*Re Heather* [1906] 2 Ch. 230).]

2028. If a father, or other person who has placed himself *in loco parentis* to a child, has charged land with a portion for such child,^(a) or has covenanted to give a portion to a child,^(b) and subsequently advances a portion to such child during his lifetime,^(c) or bequeaths a portion by his testament,^(d) there is a presumption that the later gift was intended to satisfy the obligation previously incurred, either wholly or *pro tanto*; and the child must elect between the enforcement of his rights under the obligation, and his rights under the later gift.^(e) But a devise will not satisfy an obligation to pay money, and a legacy will not satisfy an obligation to transfer land;^(f) and a clear direction in the testament that the testator's debts are to be paid will rebut the presumption of satisfaction.^(g)

*Satisfaction
of portions*

(a) *Jesson v. Jesson* (1691) 2 Vern. 256.

(b) *Thynne v. Glengall* (1848) 2 H. L. C. 131.

In re Lawes (1881) 20 Ch. D. 81.

- (c) *Jesson v. Jesson*, *ubi sup.*
- (d) *Copley v. Copley* (1711) 1 P. Wms. 147.
Onslow v. Mitchell (1812) 18 Ves. 490.

[It is otherwise if the legacy is obviously not intended as a portion (see *Cooper v. Cooper* (1873) L. R. 8 Ch. App. 813). Slight differences of limitation of the two provisions will not, but substantial differences will, rebut the presumption (*Tussaud v. Tussaud* (1878) 9 Ch. D. 363).]

- (e) *Thynne v. Glengall* (1848) 2 H. L. C. 131.
Chichester v. Coventry (1867) L. R. 2 H. L. 71.
- (f) *Bellasis v. Utbatt* (1737) West, *temp.* Hardwicke, at p. 281.
Chichester v. Coventry, *ubi sup.*, at p. 96.
- (g) *Chichester v. Coventry*, *ubi sup.*, at p. 85.
Montagu v. Earl of Sandwich (1886) 32 Ch. D. 525.

[A person not being a direct beneficiary of the testator's bounty will not be bound by the doctrine; even though, indirectly, he gets the advantage of the double provision (*Re Blundell* [1906] 2 Ch. 222).]

*Evidence to
rebut pre-
sumption*

2029. When the presumptions of ademption or satisfaction specified in §§ 2026–2028 are raised, the Court will admit parol evidence of the testator's intentions in order to rebut or maintain them.^(a) Parol evidence of words or conduct contemporaneous with a transaction not evidenced by writing may also be admitted to prove the intention of the parties to it.^(b)

- (a) *Kirk v. Eddowes* (1844) 3 Ha., at pp. 516–7.
Re Shields [1912] 1 Ch. 591.
- (b) *Kirk v. Eddowes*, *ubi sup.*, at p. 516, *per* Shadwell, V. C.

*Ademption of
non-portions
legacies*

2030. A legacy bequeathed to a legatee to whom the testator is neither a father nor *in loco parentis* is

not presumed to be adeemed by a subsequent advance to such legatee by the testator ; unless both the legacy and the advance were given for the same specified purpose, or to fulfil the same moral obligation, or the intention that the advance should adeem the legacy otherwise appears.^(a) Evidence of the circumstances under which the advance was made, and of contemporaneous declarations by the testator, is admissible to establish or rebut the presumption.^(b)

- (a) *Pankhurst v. Howell* (1870) L. R. 6 Ch. App., at pp. 137-138, *per James, L. J.*
Re Fletcher (1888) 38 Ch. D. 373.
(b) *Re Pollock* (1885) 28 Ch. D., at p. 556, *per Lord Selborne*.

2031. If a legacy or (?) a devise is given or made to an executor, it is presumed that the gift is made to him as a condition of his acting as executor ; and he will not be entitled to it if he fails to act as executor.^(a) But this presumption may be rebutted by the express terms of the testament, by expressions used in the testament indicating that the gift is not made to the executor on that condition,^(b) or by parol evidence.^(c) And the presumption does not apply to a gift of residue,^(d) or of a reversionary interest.^(e)

- (a) *In re Appleton* (1885) 29 Ch. D. 893.
(b) *Compton v. Bloxham* (1845) 2 Coll. 201.
Re Denby (1861) 3 De G. F. & J. 350.
Fewis v. Lawrence (1869) L. R. 8 Eq. 345.
(c) *In re Appleton, ubi sup.*, at p. 895, *per Cotton, L. J.*
(d) *Griffiths v. Pruett* (1840) 11 Sim. 202.
(e) *In re Reeves Trusts* (1877) 4 Ch. D. 841.

Class gifts

2032. A devise or a legacy to a number of persons will be interpreted as a gift to a class, if (i) these persons are included under some general description,^(a) and (ii) it appears that the testator intends to benefit the body of persons as a whole rather than the individuals belonging to it.^(b)

(a) *Kingsbury v. Walter* [1901] A. C., at p. 192, *per* Lord Davey.

(b) *Ibid.*, at p. 191, *per* Lord Macnaghten.

[Where there is a legacy to a class, the constitution of which is to be ascertained by reference to the Statutes of Distribution, the shares of the members of the class are also to be ascertained in accordance with the Statutes; unless a contrary intention appears in the testament (*Bullock v. Downes* (1860) 9 H. L. C. 1; *In re Nightingale* [1909] 1 Ch. 385).]

*Date for
determina-
tion of
class*

2033. A gift to a class is, *primâ facie*, a gift to the members of the class existing at the testator's death, if any such are then in existence.^(a) If none are then in existence, it is *primâ facie* a gift to all the members of the class who shall come into existence; and, till some of them come into existence, the income of the fund falls into residue.^(b)

(a) *Viner v. Francis* (1789) 2 Cox, 190.

Mortimore v. Mortimore (1879) L. R. 4 App. Ca. 448.

In re Powell [1898] 1 Ch. 227.

[If a testator makes a gift to his next of kin who shall be living at a specified date, the class is ascertained at the testator's death; but only those next of kin who survive the specified date can take (*In re Winn* [1910] 1 Ch., at pp. 288, 289). If the gift (whether of capital or income) is made payable to the members of the class on the attainment of a certain age or marriage, the class (in the absence of indications in the testament of a contrary intention) remains open till the first member of the class attains this age or marries (*Andrews v. Partington*

(1791) 3 Bro. C. C. 401; *Re Stephens* [1904] 1 Ch. 322, criticizing *Re Wenmoth's Estate* (1887) 37 Ch. D. 266, or until it is necessary to divide the fund (*Re Faux* (1915) XXXI T. L. R. 289).]

(b) *Harris v. Lloyd* (1823) 1 Turn. & Russ. 310.

[If in a gift to the children of X the testator names a definite number of such children, and such number is incorrect, the mistake will be disregarded; and all the children existing at the date of the testament will take (*In re Groom* [1897] 2 Ch. 407).]

2034. Subject to §§ 2035, 2036, 2038, and 2039, *Lapse post*, a devise, legacy, or appointment by testament or codicil lapses if the devisee, legatee, or appointee predeceases the testator.

Bl. Comm. II, 513.

Oke v. Heath (1748) 1 Ves. Sen., at p. 139.

2035. A devise, legacy, or appointment by testament or codicil made in the exercise of a power of appointment which may be exercised in any manner which the testator may think proper, to a child or other issue of the testator, of an interest in real or personal property not determinable at or before the death of such child or other issue, does not lapse, if the child or other issue predeceases the testator leaving issue, and any of such issue are living at the death of the testator; but it devolves as if the child or other issue had died immediately after the testator, unless a contrary intention appears by the testament. *Gifts to issue of testator*

Wills Act, 1837, ss. 27 and 33.

Holyland v. Lewin (1884) 26 Ch. D., at p. 272.

Re Scott [1901] 1 K. B. 228.

T T 3

[The issue living at the death of the testator need not have been living at the death of the beneficiary (*Goods of Parker* (1860) 1 Sw. & Tr. 523). But this § does not apply to appointments made in the exercise of special powers of appointment (*Holyland v. Lewin, ubi sup.*); nor does it apply to a gift to children or other issue as a class (*Re Sir E. Harvey's Estate* [1893] 1 Ch. 567). It follows from the wording of s. 33 of the Wills Act, that the surviving issue do not necessarily benefit by the bounty of the original testator, which may pass by the testament or other disposition of the original beneficiary, if appropriately worded (*Johnson v. Johnson* (1843) 3 Ha. 157; *Re Hone's Trusts* (1883) 22 Ch. D. 663).]

Joint testa-
mentary
gifts

2036. If there is a devise or a legacy to two or more persons jointly (*ante*, Bk. III, Sect. XVI, Tit. II, § 1751), and one or more of such persons predeceases the testator, the whole property comprised in the devise or legacy devolves (subject to § 2035, *ante*) on the testator's death to the survivor or survivors.

Morley v. Bird (1798) 3 Ves. 628.

Testa-
mentary
gifts in
common

2037. If there is a devise or a legacy to two or more persons in common (*ante*, Bk. III, Sect. XVI, Tit. III, § 1759), and one or more of such persons predeceases the testator, his or their share will (subject to § 2035, *ante*) lapse; ^(a) unless (i) the testator has indicated an intention that the survivor or survivors shall take such share, ^(b) or (ii) the devise or legacy has been given to the beneficiaries as a class. ^(c)

(a) *Baxter v. Losh* (1851) 14 Beav. 612.

(b) *Mackinnon v. Peach* (1838) 2 Keen, 555.

[Whether the survivor or survivors in such a case take not only the original shares of a deceased co-owner, but also any shares accrued to him by reason of the prior decease of another co-owner, is a question to be decided upon the construction of the testament as a whole. Unless the Court can see some indication of an intention that accrued shares shall accrue as well as the original shares, only the original shares will accrue (*Ex parte West* (1784) 1 Bro. C. C. 575; *Goodwin v. Finlayson* (1850) 25 Beav. 65; *Dutton v. Crowdy* (1863) 33 Beav. 272.)]

- (c) *Fell v. Biddolph* (1875) L. R. 10 C. P. 701.
In re Coleman (1876) 4 Ch. D. 165
In re Jackson (1883) 25 Ch. D. 162.

2038. If a devise has been made to a devisee for an estate tail, or an estate in quasi-entail, and the devisee predeceases the testator, leaving issue who survive the testator and are inheritable under the entail, the devise does not lapse, but takes effect as if the devisee had died immediately after the testator; unless a contrary intention appears by the testament. *Devisees of estates tail*

Wills Act, 1837, s. 32.

[By 'inheritable' issue is, presumably, meant issue capable of inheriting. In the case provided for by this §, the issue must necessarily benefit by the devise; because the original devisee cannot affect the estate by his testament.]

2039. If a testator, when he gave a legacy or made a devise, intended to discharge a moral obligation, whether legally binding or not, and if that obligation still exists at the testator's death, the death of the legatee or devisee before the testator will not cause the legacy to lapse. *Gifts to fulfil moral obligations*

Philips v. Philips (1844) 3 Ha. 281.

Re Sowerby (1856) 2 K. & J. 630.

Stevens v. King [1904] 2 Ch. 30.

[The cases all refer to legacies or testamentary appointments of personalty; but there seems no reason why the same principle should not apply to a devise. Where the doctrine applies, the property bequeathed or devised goes to the representatives of the original legatee or devisee, as part of the latter's assets (*Stevens v. King*, *ubi sup.*).]

*Donatio
mortis causâ*

2040. A person who is suffering from illness may make a *donatio mortis causâ* in contemplation of his death through the illness from which he is suffering; ^(a) and it is not necessary, in order to render the gift effectual, that he should believe that he will die of such illness.^(b) He cannot make such a gift in contemplation of suicide.^(c)

(a) *Duffield v. Elwes* (1827) 1 Bligh, N. S., 497.

Staniland v. Willott (1852) 3 Mac. & G. 664.

Cain v. Moon [1896] 2 Q. B., at p. 286.

(b) *Cain v. Moon*, *ubi sup.*, at p. 286.

(c) *Agnew v. Belfast Banking Co.* [1896] 2 Ir. R. 204.

[*Quære* : can a good *donatio mortis causâ* be made in view of the donor's death through a contemplated accident, as distinct from an illness?]

*Intention of
gift*

2041. In every *donatio mortis causâ* there must be an intention to make an immediate gift,^(a) subject to the conditions (i) that the title to the property given shall not pass absolutely to the donee till the death of the donor,^(b) and (ii) that, if the donor resumes

possession of the subject-matter of the gift,^(c) or recovers from the illness in contemplation of which the gift was made,^(d) the gift shall be void. In the last case, the donee till re-delivery holds the property as trustee for the donor.^(e)

- (a) *In re Patterson's Estate* (1864) 4 De G. J. & S. 422.
- (b) *Tate v. Hilbert* (1793) 2 Ves. Jr., at p. 119.
- (c) *Bunn v. Markham* (1816) 7 Taunt., at pp. 231, 232, *per* Gibbs, C. J.
- (d) *Cant v. Gregory* (1894) X T. L. R. 584.
- (e) *Tate v. Leithead* (1854) Kay, at p. 662.
- (f) *Staniland v. Willott* (1852) 2 Mac. & G. 664.

2042. A *donatio mortis causâ* will not be valid until the subject-matter of the gift is actually delivered by the donor^(a) or his agent^(b) to the donee or his agent,^(c) with intent to pass the ownership.^(d) A bailment to the donee, followed subsequently by a statement that the thing bailed is to be the property of the donee in the case of donor's death through the illness from which he is suffering, is a sufficient delivery for this purpose.^(e) *Necessity for delivery*

- (a) *Ward v. Turner* (1752) 2 Ves. Sen., at p. 442.
- (b) *Re Wasserberg* [1915] 1 Ch. 915.
- (c) *Miller v. Miller* (1735) 3 P. Wms. 356.
- (d) *In re Beaumont* [1902] 1 Ch., at p. 896.
- (e) *Farquharson v. Cave* (1846) 2 Coll., at pp. 367, 368.
- (f) *Solicitor to the Treasury v. Lewis* [1900] 2 Ch. 812.
- (g) *Cain v. Moon* [1896] 2 Q. B. 238.

[A delivery which, though it does not pass the property, evinces unmistakably the intention of the donor to pass the property to the donee, entitles the latter to apply to a Court of Equity to complete the gift (*Duffield v. Elwes* (1827) 1 Bligh, N. S., at pp. 543-4; *Re Dillon* (1890) 44 Ch. D., at p. 83, *per* Lindley, L. J.).]

*Gifts of
choses in
action*

2043. A chose in action may be the subject of a *donatio mortis causâ*. If the chose in action is a negotiable instrument, its delivery to the donee will be sufficient for the purposes of § 2042;^(a) even though it is payable to order and not indorsed.^(b) If the chose in action is not embodied in a negotiable instrument, the delivery of a document which acknowledges the receipt of a sum of money payable to the donor, expresses the terms on which it is payable, and shows what is the contract between the donor and the party liable to him, will be sufficient.^(c)

- (a) *Miller v. Miller* (1735) 3 P. Wms. 356 (bank notes).
- (b) *In re Mead* (1880) 15 Ch. D. 651 (bills of exchange).
Veal v. Veal (1859) 27 Beav. 303 (promissory notes).
Rolls v. Pearce (1877) 5 Ch. D. 730.
Clement v. Cheesman (1884) 27 Ch. D. 631. } (cheque of a third
Re Beaumont [1902] 1 Ch., at pp. 895, 897. } party or cheque of
} the donor actually
} negotiated)
- (c) *In re Dillon* (1890) 44 Ch. D., at p. 82.
In re Weston [1902] 1 Ch., at p. 685.

[The following documents have been held to comply with this test:—bankers' deposit notes (*Re Dillon, ubi sup.*; *Hudson v. Spencer* [1910] 2 Ch. 285); bonds (*Snellgrove v. Baily* (1744) 3 Atk. 214); mortgage deeds (*Duffield v. Elwes* (1827) 1 Bligh, N. S. 497); policies of insurance (*Amis v. Witt* (1863) 33 Beav. 619); Post Office Savings Bank books, as to the cash deposits therein contained (*In re Weston* [1902] 1 Ch. 680; *In re Andrews* [1902] 2 Ch. 394); bonds payable to bearer (*Re Wasserberg* [1915] 1 Ch. 195). On the other hand, the delivery of a receipt is not sufficient (*Moore v. Darton* (1851) 4 De G. & Sm., at p. 530), unless the document is more than a receipt, and contains the terms of the contract (*ibid.*). Similarly, the delivery of an I. O. U. is not sufficient (*Duckworth v. Lee* [1899] 1 I. R. 405).]

2044. When the delivery of a document does not, either at law or in equity, pass the property in the chose in action evidenced by it,^(a) or when a document is merely an authority given by the donor which is revocable by his death,^(b) its delivery to a donee will not be sufficient for the purposes of § 2042, *ante*.

Delivery of evidences of title

- (a) *Ward v. Turner* (1752) 2 Ves. Sen. 431 (receipts for South Sea annuities).
Moore v. Moore (1874) L. R. 18 Eq. 474 (certificates of railway stock).
In re Weston [1902] 1 Ch. 680 (certificates of Building Society shares).
In re Andrews [1902] 2 Ch. 394 (certificate of investment in government stock).
- (b) *Hewitt v. Kaye* (1868) L. R. 6 Eq. 198. } (cheques drawn by donor
In re Beak's Estate (1872) L. R. 13 Eq. } and not presented in his
 489. } lifetime)
Re Mead (1880) 15 C. D. 651 (cheque to withdraw deposit).
In re Beaumont [1902] 1 Ch. 889 (cheque drawn by deceased on his account which was overdrawn, and not paid before his death).

[The question whether a valid *donatio mortis causâ* is made by the delivery of any given document, which either creates or evidences a chose in action, is difficult, because, in recognizing or refusing to recognize such delivery as effectual for this purpose, the Courts have not followed any one principle. The principles upon which the Courts have recognized delivery as effectual, are set out in § 2043; and the vagueness of the test applied to non-negotiable choses in action obviously leaves a good deal of uncertainty, in the case of any given document which has not been adjudicated upon by the Courts. The principles upon which the Courts have refused to recognize delivery as effectual are dealt with in § 2044. They seem to be (i) that, if a particular mode of transfer is prescribed by law, nothing but that mode can have any effect at law or in equity; (ii) that a mere authority to pay (even though embodied in a document, such as a cheque drawn by the donor on his bank) is not a chose in action which admits of transfer, because the authority is revoked by the donor's death. Of course, if a cheque comes into

the hands of a third party who is a holder in due course, it is a negotiable instrument, and is governed by the rules applicable to such an instrument.]

*Donatio
mortis causâ
on trust*

2045. A *donatio mortis causâ* may be made to the donee as trustee for another person, or for the carrying out of particular purposes.

Blount v. Burrow (1792) 4 Bro. C. C., at p. 75.
Hills v. Hills (1841) 8 M. & W. 401.

*Does not
pass to
personal
representa-
tive of
owner*

2046. The death of the donor of a *donatio mortis causâ* does not vest the property in the subject-matter of such gift in his representative, but perfects the title of the donee; ^(a) and no assent on the part of the representative is required to complete the gift. ^(b) But the property given may be taken to pay the creditors of the deceased, in the event of a deficiency of the donor's assets. ^(c)

- (a) *Tate v. Hilbert* (1793) 2 Ves., at p. 120.
- (b) *Ibid.*
- (c) *Tate v. Leithead* (1852) Kay, at p. 659.

BOOK V

SUCCESSION (*continued*)

SECTION II

INTESTATE SUCCESSION

TITLE I—GENERAL

2047. Subject to Sect. III, Tit. II, and to the claims of his creditors, all the property belonging to a deceased person in his own right which has not been effectively disposed of by his testament (if any), and which is not extinguished by his death, passes by the rules of intestate succession to his heirs,^(a) next of kin,^(b) or husband or wife respectively.^(c) In so far as there is a failure of such persons, it passes (being real estate) by escheat, or (being personal estate) as *bona vacantia*.^(d)

*Different
classes of
successors*

- (a) *Post*, Title II.
- (b) *Post*, Title III.
- (c) *Post*, Title IV.
- (d) *Post*, Title V.

[This Section deals exclusively with property which belonged to the deceased in his own right. Property belonging to him in a fiduciary or representative capacity passes according to the rules stated in the Sections dealing with such capacity.]

*Succession by
- person caus-
ing death*

2048. It is doubtful whether the rule that a person proved to have caused the death of a testator by an act which is a criminal offence cannot claim any benefit under the testament (*ante*, Sect. I, Tit. IV, § 2019) is applicable also to intestate succession.

Re Houghton [1915] 2 Ch. 173.

*Title of
beneficiary*

2049. Where a beneficiary takes property of a deceased person as heir or next of kin through the personal representative of the deceased (*post*, Sect. III, Tit. II), he cannot require a conveyance or payment by the representative until the expiry of a year from the decease (*post*, Tit. II, § 2060).

Statute of Distribution (1670) s. 8.

Land Transfer Act, 1897, s. 3 (2).

Cooper v. Cooper (1874) L. R. 7 H. L., at p. 65, *per* Lord Cairns, C.

TITLE II — INHERITANCE OF REAL ESTATE

2050. The undisposed of real estate (*ante*, Bk. I, Sect. II, § 37) to which a deceased person was solely and beneficially entitled at his decease passes (subject to Title IV, *post*, and to payment of his debts) according to the rules of inheritance either of the common law (as amended by statute) or of the local custom.^(a) Generally speaking, all socage interests of inheritance pass according to the rules of the common law ^(b) (as amended by statute), and all copyhold and customary interests of inheritance according to the rule of the local custom.^(c) But socage interests may (as respects the inheritance thereof) be governed by the rules of local custom.^(d) Whether they are so governed, is a question of fact for the jury; but there is a presumption that all socage interests in Kent are subject to the custom of gavelkind.^(e)

- (a) Inheritance Act, 1833, s. 1.
Administration of Estates Act, 1833.
Re Hughes [1916] 1 Ch. 493.

[The interest of a joint tenant passes on his death to the other joint tenants or tenant, not to his heir (*ante*, Bk. III, Sect. VI, Tit. II, § 1753).]

- (b) These rules extend not only to estates in the technical sense, but to possibilities, rights, titles, and other minor interests, legal or equitable (Inheritance Act, 1833, s. 1).
(c) But where the custom is silent, copyholds descend according to common law rules (*Denn v. Spray* (1786) 1 T. R., at p. 474, *per* Ashurst, J.).

- (d) The most common of these variations is that of gavelkind, by which estates of inheritance descend equally to all males in the same degree (Litt., s. 210).
- (e) Litt., s. 210.
Re Chenoweth [1902] 2 Ch. 488.

[‘Real estate,’ for the purposes of this Title, includes not only real estate in the ordinary meaning of the term (*ante*, Bk. I, Sect. II, § 37) but also personal property which, by reason of the equitable doctrine of Conversion (*post*, Sect. III, Tit. III, §§ 2134–2140), is deemed for such purposes to be real estate (Inheritance Act, 1833, s. 1).]

*Bastard
cannot in-
herit*

2051. No person can inherit real estate in England unless he was born in lawful wedlock; ^(a) nor can any one, except his lawful issue, inherit real estate from a person not so born. ^(b)

- (a) *Doe v. Vardill* (1835) 2 Cl. & F. 571; (1840) 7 Cl. & F. 895.

[The result of this rule is, that a person born out of wedlock, though he may be legitimated for most purposes by the subsequent marriage of his parents (*Re Goodman's Trusts* (1881) 17 Ch. D. 266), cannot inherit English real estate, except from his own legitimate issue.]

- (b) *Re Don* (1857) 4 Drew. 194.

[Probably the rule in the text does not apply to succession to leaseholds (*Dicey, Conflict of Laws* (2nd ed.), at p. 487).]

*Descent
traced first
from ‘pur-
chaser’*

2052. Subject to Bk. III, Sect. XVI, Tit. IV, § 1764, *ante* (co-parcenary), descent is in all cases traced in the first instance from the purchaser, ^(a) i. e. from the person who last acquired the estate otherwise than by descent, or by any escheat, partition, or enclosure, by the effect of which the estate became

part of, or descendible in the same manner as, other real estate acquired by descent.^(b) But if there is a total failure of the heirs of the purchaser, or if any real estate is descendible as if an ancestor had been the purchaser thereof and there is a total failure of the heirs of such ancestor, descent is then traced from the person last entitled to the estate, as if he had been the purchaser.^(c)

(a) Inheritance Act, 1833, s. 2.

[In the language of the common law, 'descent' included inheritance by collaterals, as well as by issue; and the Inheritance Act extended the scope of the term to inheritance by ancestors.]

(b) *Ibid.*, s. 1.

[The rule applies to copyholds and other customary tenures as well as to socage (*Muggleton v. Barnett* (1857) 2 H. & N. 653).]

(c) Law of Property Amendment Act, 1859, s. 19.

[An obvious effect of this enactment is to enable a woman to inherit real estate from her issue, though they have inherited it from her husband. She could not, of course, inherit directly from her husband as such.]

2053. It is a presumption of law that, for the purpose of tracing descent, any person entitled to the estate was a purchaser, until it is proved that he acquired it by inheritance. *Presumption of purchase*

Inheritance Act, 1833, s. 2.

2054. A devise to the testator's heir, and an assurance to the assesor or his heirs, if taking effect after *Double title*

1833, constitute the testator's heir or the assesor respectively a purchaser for the purposes of § 2052; and a limitation to the heirs or heirs of the body of any person, made after 1833, constitutes that person a purchaser for similar purposes.

Inheritance Act, 1833, ss. 3, 4.

[It is not uncommon, in a strict settlement of real estate, for the ultimate limitation to be in favour of the settlor's 'right heirs'; and, if no such ultimate limitation is expressed, and there is an undisposed of interest, it will result to the settlor. In either of these events, the descent is 'broken'; and the settlor, though in fact he had inherited the estate, becomes a purchaser for the purposes of future descent.]

*Descent to
issue*

2055. Socage interests of inheritance descend in the first instance to the issue of the purchaser *in infinitum*; the nearer degree excluding the remoter, except that the issue of any deceased person represent their ancestor *in infinitum*.

Co. Litt. 10 b.

Bl. Comm. II, 217.

But:—

- (i) male issue exclude female in the same degree; and

Co. Litt. 10 b.

Hale, *History of the Common Law* (ed. 1794), II, 116.

- (ii) among males in the same degree, the elder excludes the younger, though females in the same degree inherit equally as coparceners.

Litt. s. 5.

Co. Litt. 14 a.

Hale, *op. cit.*, II, 119.

2056. In the descent of an estate in tail male (*ante*, *Descent of estates tail* Bk. III, Sect. I, Tit. III, § 1054) all females and their issue are excluded; and in the descent of an estate in tail female (*ibid.*) all males and their issue are excluded.

Litt. ss. 23, 24.
Co. Litt. 24 b, 25.

[Of course, estates tail can only descend to the issue of the donee (purchaser), not to his ancestors or collaterals (see Bk. III, Sect. I, Tit. III, § 1054).]

2057. On failure of the issue of the purchaser, a socage interest in fee simple descends to the nearest lineal ancestor of the purchaser and his issue *in infinitum*, according to the rules laid down in § 2055, *ante*.^(a) But all paternal ancestors and their issue are preferred to all maternal ancestors and their issue; and, among paternal and maternal ancestors respectively, all male ancestors and their issue are preferred to all female ancestors and their issue,^(b) while, among female ancestors, paternal or maternal, the mother of the more remote male ancestor, and her issue, are preferred to the mother of the less remote and her issue.^(c)

- (a) Inheritance Act, 1833, s. 6.
- (b) *Ibid.*, s. 7.
- (c) *Ibid.*, s. 8.

[The rules laid down in the above §, which were introduced by the Inheritance Act of 1833, virtually abolish direct collateral inheritance altogether; collateral relatives inheriting only as representing the common ancestor. This principle is, indeed, expressly

enacted in the case of brothers and sisters (Inheritance Act, 1833, s. 5). Of course relatives by affinity (marriage) have no rights of inheritance.]

*Descent
to half
blood*

2058. Collateral relatives of the half blood to the purchaser may inherit under § 2057; but they inherit only next after relatives of the whole blood (male or female) in the same degree, and their issue.

Inheritance Act, 1833, s. 9.

[The application of this rule leads to different results, according to whether the common ancestor is a male or a female. Where the common ancestor is a male, the whole blood collaterals of the same degree as the half blood take after and as representing him, and the half blood collaterals rank next after them; where the common ancestor is a female, the whole blood collaterals come before her, as representing their deceased male ancestor, and the half blood represent, and therefore take after, her (*ibid.*). This is the explanation of the rule (apparently arbitrary) stated in s. 9 of the Inheritance Act, that "the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother."]

*Extent
of local
custom*

2059. The existence and extent of a local custom of inheritance contrary to the common law are questions of fact for the jury;^(a) and proof of a local custom affecting descent in a nearer degree is no proof that a similar custom affects a remoter.^(b)

(a) *Re Chenoweth* [1902] 2 Ch. 488.

(b) *Muggleton v. Barnett* (1857) 2 H. & N., at p. 661, *per* Crompton, J.

[But gavelkind is not, at any rate in Kent, a local custom contrary to the common law for this purpose (*Re Chenoweth, ubi sup.*).]

2060. The claim of the heir to a socage^(a) fee simple interest^(b) or an equitable fee simple in copyhold or customary lands^(c) is subject to the estate or interest of the personal representative of the deceased in whom the estate becomes vested on his death for purposes of administration (*post*, Sect. III, Tit. II).^(d) But, subject to the claims of the deceased's creditors, the personal representative may at any time after the decease, convey such interest to the person entitled as heir; and, if he fails to do so, the Court may, at the expiry of one year from the decease, on the application of the heir, order such a conveyance to be made.^(e)

*Rights of
personal
representa-
tive*

- (a) Copyholds and customary freeholds which require conveyance to a purchaser by surrender and admittance do not pass to the personal representative of the deceased (Land Transfer Act, 1897, s. 1 (4)).
- (b) It is assumed (though the Act is silent on the point) that estates tail do not pass to the personal representative of the deceased owner; because they are not assets for payment of his debts.
- (c) *Somerville's and Turner's C.* [1903] 2 Ch. 583.
- (d) Land Transfer Act, 1897, s. 1 (1).

[Apparently even the special occupant of an estate *pur autre vie* claims through the personal representative by virtue of the Land Transfer Act, 1897, s. 1 (*post*, Sect. III, Tit. III, § 2126).]

- (e) *Ibid.*, s. 3 (2).

2061. For the purposes of this Title, an estate *pur autre vie* is real estate if, on the decease of the tenant, it stands limited to his heirs or the heirs of his body, and the tenant dies leaving an heir of the class de-

*Special
occupant*

scribed in the limitation (*ante*, Bk. III, Sect. I, Tit. IV, § 1082).

Wills Act, 1837, s. 6.

Philpotts v. James (1784) 3 Doug. 425.

Re Michell [1892] 2 Ch. 87.

E. of Mount-Casbell v. More-Smyth [1896] A. C. 158.

[The question whether an estate *pur autre vie* stands limited to the heirs of the tenant is settled by the terms of the conveyance to him, and not by the terms of the original creation (*E. of Mount-Casbell v. More-Smyth*, *ubi sup.*, at p. 161, *per* Lord Davey). But, of course, where that conveyance is a testament, the rule prevails that technical words are not necessary (*Re Sheppard* [1897] 2 Ch., at p. 69, *per* Romer, J.); though there must be some evidence in the language of the testament to show that the testator intended the estate to pass as real estate (*Re Inman* [1903] 1 Ch. 241).]

Deaths before 1834

2062. The rules laid down in this Title do not govern descent arising on deaths which took place before 1st January, 1834;^(a) and a limitation in an assurance which took effect before that date to the heir or heirs of any person by way of purchase, will be construed in accordance with the law as it stood at the passing of the Inheritance Act, 1833.^(b)

(a) Inheritance Act, 1833, s. 11.

(b) *Ibid.*, s. 12

[Before the passing of the Inheritance Act, a devise to the testator's heir was inoperative; and the heir took by descent, not by purchase.]

TITLE III—SUCCESSION TO PERSONAL ESTATE

2063. Subject to § 2065, *post*, and to Tit. IV, the undisposed of personal estate (*ante*, Bk. I, Sect. II, § 38) of a deceased person passes (after payment of his debts) to his or her next of kin, according to the rules laid down by the Statutes of Distribution.^(a) For this purpose, personal estate not expressly disposed of by a testament is, though vested in executors, regarded as undisposed of; unless the testament contains an indication that the executors are to hold it beneficially.^(b)

(a) Statute of Distribution (1670).

1 Jac. II (1685), c. 17. (Apparently there is no official short title for this Act.)

Re Hughes [1916] 1 Ch., at p. 500, *per* Younger, J.

[Local customs governing the distribution of personal estate on intestacy were abolished by the Act for the Uniform Administration of Intestates' Estates, 1856, which, though repealed by the Statute Law Revision Act, 1892, has not lost its effect for the purpose. There are certain statutory provisions by which the naval and military authorities, and the Board of Trade, may dispose in special ways of the effects of deceased sailors, soldiers, and merchant seamen respectively; but these are not of sufficient general interest to warrant detailed statement.]

(b) Executors Act, 1830.

[If the property is bequeathed to the executors, this Act does not apply; and the Court must decide, upon the construction of the will, whether the executors were intended to take beneficially, or not (*Williams v. Arkle* (1875) L. R. 7 H. L. 606).]

Domicile

2064. The devolution of the personal estate of a deceased intestate, in so far as it is governed by the law of succession,^(a) is governed by the law of succession of the deceased's domicile at the time of his decease^(b) (*ante*, Bk. I, Tit. I, §§ 4-11).

(a) *Re Barnett's Trusts* [1902] 1 Ch. 847.

(b) *Re Goodman's Trusts* (1881) 17 Ch. D. 266.
Re Aganoor's Trusts (1895) 64 L. J. Ch. 521.

[A change in the law of the deceased's domicile made subsequently to his decease, will not, therefore, affect the rights of his successors (*Re Aganoor, ubi sup.*).]

Rules of distribution

2065. If the deceased leaves a widow and children, the widow takes one third of his undisposed of personal estate, and the children (subject to §§ 2066 and 2067) two thirds equally between them.^(a) If the deceased leaves a widow but no children, the widow (subject to Tit. IV, § 2079, *post*) takes one moiety of his personal estate.^(b) If he leaves children but no widow, the children (subject to §§ 2066 and 2070) take the whole of his personal estate equally between them.^(c) If the deceased leaves no widow or children, or, if he leaves a widow, in so far as the claims of the widow do not extend, the undisposed of personal estate of the deceased is (subject to §§ 2066-2068) divided equally amongst the persons in the nearest degree of kindred to the de-

ceased, however remote, living at the time of his decease, *per capita*.^(d)

- (a) Statute of Distribution (1670) s. 3.
- (b) *Ibid.*, *ad fin.*
- (c) *Ibid.*
- (d) *Ibid.*

[It is a general rule that persons claiming under an intestacy in their own right take *per capita*; those claiming by right of representation, *per stirpes* (*Re Ross' Trusts* (1871) L. R. 13 Eq., at p. 293, *per Wickens*, V. C.).]

2066. For the purposes of § 2065, issue of deceased children of the intestate represent their deceased ancestors *per stirpes*; ^(a) and, where there is any surviving brother or sister of the intestate, the children of a deceased brother or sister represent their parent *per stirpes*. ^(b) But, subject to these provisions, there is no representation of deceased kindred in distribution. ^(c)

Representation of deceased kindred

- (a) Statute of Distribution (1670) s. 3 (2).
Re Natt (1888) 37 Ch. D. 517.

[In this case the right of representation is not confined to the children of deceased children, but extends to the issue of deceased children indefinitely (*Carter v. Crawley* (1683) T. Raym., at p. 500, *per* Sir T. Raymond, J.; *Re Ross' Trusts* (1871) L. R. 13 Eq. 286). But the widows of deceased issue have no claim by intestacy on the estate of the intestate (*Price v. Strange* (1820) 6 Madd., at p. 162, *per* Leach, V. C.).]

- (b) Statute of Distribution (1670) s. 4. (But not remoter issue (*Pett's Case* (1692) 1 P. Wms. 25; *Carter v. Crawley*, *ubi sup.*).)

[Thus nephews and nieces do not take as representing their deceased parents, unless a brother or sister of the intestate survives

him (*Walsh v. Walsh* (1695) Pre. Ch. 54; *Lloyd v. Tench* (1750) 2 Ves. Sen. 212).]

(c) Statute of Distribution (1670) s. 4.

Carter v. Crawley, *ubi sup.* (Opinion of Doctors' Commons).

*Parental
rights*

2067. The father of the intestate excludes the mother entirely;^(a) and, if the father of the intestate has predeceased him, the mother shares equally with the brothers and sisters of the deceased, and with the children (*per stirpes*) of such of them as have predeceased the intestate, if any.^(b)

(a) *Blackborough v. Davis* (1701) 1 P. Wms., at p. 48, *per* Holt, C. J.

[Probably this rule was merely the consequence of the principle of the common law, which would at once have vested any personal estate acquired by the mother in her husband. But it would appear to have survived the Married Women's Property Acts.]

(b) 1 Jac. II (1685) c. 17, s. 7.

[The words of the statute appear to confer on the mother, the brothers and sisters, and the 'representatives' of brothers and sisters, of an intestate, a right to succeed if the intestate leaves no wife or children; but it has been decided that, though there is no wife, the section applies; but only if there are no issue of the intestate (*Keylway v. Keylway* (1726) 2 P. Wms. 344; *Stanley v. Stanley* (1739) 1 Atk. 455). But the word 'representatives' includes only the children of deceased brothers and sisters, not remoter issue (*Stanley v. Stanley*, *ubi sup.*, p. 457). Under s. 4 of the statute of 1670, children of deceased brothers and sisters can only take if a brother or sister of the intestate survives (*ante*, § 2066, n. (b)); but, under this statute, such children take, whether or not a brother or sister survives (*Stanley v. Stanley*, *ubi sup.*). Of course if the intestate leaves no issue and no brothers or sisters or children of brothers or sisters, the mother (subject to the claim of the widow, if any) takes all as next of kin (*Stanley v. Stanley*, *ubi sup.*, at p. 457, *per* Lord Hardwicke, C.).]

*Mode of reckon-
ing degrees
of kindred*

2068. For the purposes of § 2065, degrees of kindred are computed by reckoning up from the intes-

tate to the common ancestor, and from the common ancestor down to the claimant, and counting each step a degree.^(a) But grandparents are postponed to brothers and sisters of the intestate.^(b)

- (a) *Mentney v. Petty* (1722) Pre. Ch. 593.
Thomas v. Ketteriche (1749) 1 Ves. Sen. 333.
Lloyd v. Tench (1750) 2 Ves. Sen., at p. 214, *per* Sir John Strange, M. R.

[This is the method of the Civil as distinct from the Canon Law.]

- (b) *Evelyn v. Evelyn* (1754) 3 Atk. 762.

[*Semble*, a preference over grandparents is also given to nephews and nieces taking by representation under § 2066, *ante*. Relatives by affinity (marriage) are, of course, not kindred for the purposes of succession.]

2069. In considering claims to intestate succession, no preference is given to age, nor (subject to § 2067) sex;^(a) and collaterals of the half blood rank equally with collaterals of the whole blood in the same degree.^(b)

No preference of age or sex

- (a) Statute of Distribution (1670), *passim*.
Blackborough v. Davis (1701) 1 P. Wms., at p. 50, *per* Holt, C. J.
Moor v. Barham (1723) *ibid.*, at p. 53.
- (b) *Crooke v. Watt* (1690) 2 Vern. 124.
Burnet v. Mann (1748) 1 Ves. Sen., at p. 157, *per* Lord Hardwicke, C.
Jessopp v. Watson (1833) 1 Myl. & K. 665.

2070. No child of the intestate to whom a portion *'Hotchpot'* (either in real estate or personal estate)^(a) has been advanced by the intestate in his lifetime can claim

any share under the Statutes of Distribution in the personal estate of a father^(b) dying wholly intestate,^(c) without bringing such advancement into account for the benefit of the other children of the intestate, or their representatives;^(d) and the same rule applies to the issue of such child claiming by representation the share of their deceased ancestor who has been so advanced.^(e) But the rule has no application to an heir at law in respect of any land coming to him from the intestate by descent or otherwise;^(f) and (*semble*) it does not apply to the children of deceased brothers and sisters of the intestate whose parents have received benefits from the intestate in his lifetime.^(g)

(a) *Edwards v. Freeman* (1727) 2 P. Wms., at p. 440, *per* Jekyll, M. R.

[*Seem*, any land settled on a child (other than the heir at law) is a portion for this purpose (*Twisden v. Twisden* (1804) 9 Ves., at p. 425, *per* Lord Eldon, C.).]

(b) *Holt v. Frederick* (1726) 2 P. Wms. 356.

(c) *Vachell v. Jeffereys* (1701) Pre. Ch. 170.

Cowper v. Scott (1731) 3 P. Wms. 119.

Re Roby [1908] 1 Ch. 71.

[Therefore no provision made by the father's will need be brought into account (*Edwards v. Freeman, ubi sup.*, at p. 440, *per* Jekyll, M. R.).]

(d) Statute of Distribution (1670) s. 3.

(e) *Proud v. Turner* (1729) 2 P. Wms. 560.

(f) Statute of Distribution (1670) s. 3.

[The heir at law, if a child of the intestate, must account for personal estate advanced to him by his father (*Kirkcudbright v. Kirkcudbright* (1802) 8 Ves. 51).]

(g) *Re Gist* [1906] 1 Ch. 58; *affd.* 2 Ch. 280.

[In this case the children of a deceased sister were held not bound to account, even though the sums advanced to their parent were ad-

vanced under an order of the Court which expressly directed that the parent should do so. On the other hand, the sums were not advanced as 'portions,' with regard to the nature of which, see *ante*, Sect. I, Tit. IV, §§ 2027, 2028. The benefit of hotchpot goes only to the other children of the intestate or their representatives, not to the intestate's widow (*Kirkcudbright v. Kirkcudbright*, *ubi sup.*.)]

2071. A person who leaves a testament which, though *primâ facie* regular, is wholly inoperative, is deemed to die wholly intestate for the purposes of § 2070;^(a) but (*semble*) the fact that all the beneficial dispositions of a testament fail has not that effect, if the legal title to the testator's property is effectually disposed of by the testament.^(b)

(a) *Re Ford* [1902] 2 Ch. 605.

[Here the will left everything to the testator's widow, appointing her sole executrix; and she died before the testator.]

(b) *Walton v. Walton* (1807) 14 Ves., at p. 324, *per* Grant, M. R.

2072. The provisions of Sect. I, Tit. IV, § 2017. *Beneficiary must account*
ante, apply to the case of a person entitled to a distributive share of the personal estate of an intestate.

Re Cordwell's Estate (1875) L. R. 20 Eq. 644.

Re Knapman (1880) 18 Ch. D. 300.

[To the authorities for § 2017 may now be added *Re Dacre* [1916] 1 Ch. 344.]

2073. A person claiming by intestacy a share of the personal estate of a deceased person has no right to any specific chattel of the deceased.^(a) But his

*Beneficiary
no direct
title*

U U

claim vests immediately on the intestate's decease;^(b) and even a declaration in the deceased's testament that his next of kin shall not succeed to his undisposed of personal estate will not deprive such persons of their rights.^(c)

(a) Statute of Distribution (1670) s. 5.

Cooper v. Cooper (1874) L. R. 7 H. L., at p. 65, *per* Lord Cairns, C.

[Presumably, the administrator has a legal right to insist on converting the whole estate into money against the wishes of the next of kin. *Quære*: Would the Court, in the exercise of its equitable jurisdiction, restrain an administrator from making an oppressive use of this right? (*Blake v. Bayne* [1908] A. C. 371).]

(b) *Brown v. Shore* (1689), 1 Show. 25.

Brown v. Farndell (1690) Carth. 51.

Cooper v. Cooper, *ubi sup.*

Vanneck v. Benham [1917] 1 Ch. 60.

[Consequently, if the next of kin dies after the intestate but before distribution of the estate, his rights pass to his representatives.]

(c) *Johnson v. Johnson* (1841) 4 Beav. 318.

[But, of course, where the evident intention of the testator in excluding some or one of his next of kin is to bequeath the property to the others, his intention will be followed (*Bund v. Green* (1879) 12 Ch. D. 819).]

*General
occupant*

2074. For the purposes of this Title, an estate *pur autre vie* which is not limited to the heirs or the heirs of the body of the tenant devolves as personal estate.

Wills Act, 1837, s. 6.

E. of Mount-Cashell v. More-Smyth [1896] A. C. 158.]

Re Sheppard [1897] 2 Ch. 67.

TITLE IV — SUCCESSION BETWEEN HUSBAND AND WIFE

2075. Subject to § 2078, *post*, a man is entitled, *Curtesy* on the death of his wife, to a life interest in any real estate (legal or equitable) ^(a) held by common socage, to which his wife was solely and beneficially entitled at the time of her decease, for a present interest capable of passing by inheritance ^(b) to her issue by him; provided that (i) in fact such issue was born alive during the marriage, ^(c) and (ii) the husband had, so far as possible, ^(d) reduced the interest into possession before her death. ^(e)

(a) *Sweetapple v. Bindon* (1705) 2 Vern. 536.

Watts v. Ball (1708) 1 P. Wms. 108.

Casborne v. Scarfe (1737) 1 Atk. 603.

[The position of purely incorporeal hereditaments (*ante*, Bk. III, Sect. I, Tit. IX) is doubtful. Coke (Co. Litt. 29 a, 30 b) mentions advowsons, rents, and a right of common *sans nombre*, as subject to curtesy. Of course there can be no curtesy of an interest *in futuro* (*ibid.* 29 a); but a freehold estate subject only to a term of years is not an interest *in futuro* for this purpose (*ante*, Bk. III, Sect. I, Tit. VIII, § 1167, and Co. Litt. 29 b).]

(b) The estate must be strictly inheritable by the issue; and if they take by purchase under a limitation over on the death of the wife, there is no curtesy (*Sumner v. Partridge* (1740) 2 Atk. 47). *Semble*, therefore, there can be no curtesy of an estate *pur autre vie* (*Stead v. Platt* (1853) 18 Beav. 50).

(c) The issue need not have survived the wife (*Buckworth v. Thirkell* (1785) 3 Bos. & P. 652).

(d) *Eager v. Furnivall* (1881) 17 Ch. D. 115.

U U 2

(e) Litt., s. 35.

Co. Litt. 29, 30.

Hope v. Hope [1892] 2 Ch. 336.

[It is immaterial that the property was expressly settled to the wife's separate use (*Appleton v. Rowley* (1869) L. R. 8 Eq. 139; *Cooper v. Macdonald* (1877) 7 Ch. D. 288). And, of course, a restraint on anticipation, which loses its effect on the wife's death, cannot deprive the husband of his curtesy after that event (*Cooper v. Macdonald, ubi sup.*). In lands subject to the custom of gavelkind, the husband has (until re-marriage) an estate by the curtesy of one half; but issue by him need not have been born, provided that, if born, they could have inherited from the wife (Co. Litt. 111 a, 30 a). There are also variations from the common law rule in some boroughs (Litt., s. 166). In copyholds, the claim of the husband is governed by the custom of the manor (*Brown's Case* (1581) 4 Rep., at fo. 22 a).]

*Position of
tenant*

2076. A tenant by the curtesy has all the rights and liabilities of a tenant for life at the common law or in equity,^(a) and has the statutory powers of leasing of a tenant for life under the Settled Estates Act, 1877,^(b) and the statutory powers of a tenant for life under the Settled Land Acts, 1882-1890^(c) (*ante*, Bk. III, Sect. VI, Tit. II).

(a) Bl. Comm. II, 122.

[For these rights and liabilities, see *ante*, Bk. III, Sect. I, Tit. IV.]

(b) Settled Estates Act, 1877, s. 46.

(c) Settled Land Act, 1882, s. 58 (viii).

*Husband's
rights in
wife's per-
sonality*

2077. Subject to § 2078, *post*, a man is entitled, in the event of his wife's death, to all the corporeal personal estate (including separate property) to which she

died beneficially entitled, or in which she had an actual beneficial interest, legal or equitable, at the time of her decease, and which does not come to an end at her decease.^(a) To her choses in action (*ante*, Bk. III, Sect. XIII) he becomes entitled on taking out letters of administration to her estate, but (*semble*) subject to her debts.^(b)

- (a) *Re Bellamy* (1883) 25 Ch. D. 620.
Re Lambert (1888) 39 Ch. D. 626.

[*Semble*: though a husband's title to his wife's undisposed of corporeal personal estate is complete by her death, he will, for practical reasons, be obliged to take out letters of administration in respect of it. (But see *Surman v. Wharton* [1891] 1 Q. B. 491.).]

- (b) 31 Edw. III (1357) st. I, c. 11.
 Statute of Frauds (1677) s. 25.

[The husband's right to administration, being a beneficial right, passes to his personal representatives, and even to his trustee in bankruptcy (*Drew v. Long* (1853) 22 L. J. Ch. 717).]

2078. The rights described in §§ 2075, 2076, 2077, *ante*, are defeated wholly, or *pro tanto*, by: — *Wife's power of disposition*

- (i) any disposition by the wife, either *inter vivos* or by her testament;

Hope v. Hope [1892] 2 Ch., at p. 339, *per* Stirling, J.

[Of course, if the marriage took place before 1883, and the wife had acquired the property before marriage, she would be incapable of disposing of it without her husband's consent (Married Women's Property Act, 1882, ss. 2, 5); unless it had been settled to her separate use, in which case the rule in the text would apply (*Cooper v. Macdonald, ubi sup.*, at pp. 295-6).]

- (ii) a decree for the dissolution of the marriage between the person claiming the prop-

erty and the person whose property is claimed;

Wilkinson v. Gibson (1867) L. R. 4 Eq. 162.

[This was a case of the wife's reversionary personalty; but the reasoning and language apply with greater force to real estate and personalty in possession (see especially pp. 168, 169). The parties, in fact, have ceased to be husband and wife.]

(iii) a decree for judicial separation between similar parties, unless the parties have again cohabited;

Matrimonial Causes Act, 1857, s. 25.

(iv) a protection or separation order pronounced in favour of the wife, unless the parties have again cohabited;

Matrimonial Causes Act, 1857, s. 21.

Summary Jurisdiction (Married Women) Act, 1895, s. 5 (a).

[It seems doubtful whether a protection order under the former of these two statutes excludes the husband from any property other than that acquired by the wife since his desertion.]

(v) any effectual direction for payment of her debts by the wife in her testament, even though the property in question was restrained from anticipation during her lifetime.

Sprange v. Lee [1908] 1 Ch. 424.

[Presumably, if the marriage took place before 1883, such a direction would, apart from exceptional cases such as those described in (ii), (iii), and (iv), only be effectual as regards property settled to the separate use of the wife or acquired by her since 1882 (Married Women's Property Act, 1882, s. 5). It seems doubtful how far, in the absence of such a direction, the claim of the wife's creditors would be preferred to the husband's curtesy. And there is

little (if any) express authority for saying that the husband's claim *jure mariti* to his wife's personal estate would be subject to her debts; unless these could be enforced under the express provisions of the Married Women's Property Acts (Act of 1882, ss. 14, 23; 1893, s. 1; *Surman v. Wharton* [1891] 1 Q. B. 491). But it has been held that where the wife's property was in fact vested in executors, they held in trust for the husband only after payment of her debts (*Re Lambert* [1888] 39 Ch. D. 626). And see the remarks of Neville, J., in *Sprange v. Lee*, *ubi sup.*, at p. 432.]

2079. If a man dies wholly intestate,^(a) leaving a widow but no issue, and his whole property, real and personal, at the time of his decease,^(b) does not exceed £500 in net value,^(c) the whole of such property will belong to his widow.^(d) Where the property of a man dying wholly intestate^(a) and without issue exceeds in net value £500,^(c) his widow will be entitled, in priority to all other claimants by way of inheritance or intestacy, to a sum of £500 thereout, absolutely and exclusively; and will have a charge for such sum upon the real and personal estates of her deceased husband, in proportion to their respective values.^(e) Such provision will be in addition and without prejudice to her claims under the Statutes of Distribution (*ante*, Tit. III, § 2065) and in respect of dower (*post*, §§ 2080–2087).^(f)

(a) *Re Twigg's Estate* [1892] 1 Ch. 579.

[But where a testator's will has become wholly inoperative by lapse of all the beneficial dispositions and the death of all the executors in his lifetime, he will die wholly intestate for the purposes of this § (*Re Cuffe* [1908] 2 Ch. 500).]

(b) *Re Heath* [1907] 2 Ch. 270.

*Widow's
statutory
claim*

- (c) The net value of the real estate will be the value calculated in manner provided by the statute (s. 5) less any charges thereon, and of the personal estate the gross value (at the time of the intestate's death) less debts, funeral, and 'testamentary' (i. e. administration) expenses of the intestate (s. 6; *Twigg's Estate* [1892] 1 Ch., at p. 582, *per* Chitty, J.).

- (d) Intestates Estates Act, 1890, s. 1.

[Presumably, in spite of the language of the Act, the widow only takes the beneficial interest; the legal ownership vesting in the representative or customary heir.]

- (e) *Ibid.*, ss. 2, 3.

- (f) *Ibid.*, s. 4.

[But of course the widow's claim to dower will be modified by the diminution in the value of the deceased's real estate caused by the statutory charge in her favour (*Re Charrière* [1896] 1 Ch. 912). Presumably, the same principle will apply to the personal estate. It does not appear to have been yet decided whether the claims of the widow under the statute will prevail against the claim of the Crown to *bona vacantia*; the Crown not being expressly bound by the statute.]

Dower

2080. Subject to §§ 2082 and 2084, the widow (a) of a man who dies solely and beneficially entitled (b) to any common socage real estate (c) in possession (d) (whether legal or equitable), (e) which issue of her by him might have inherited, (f) will be entitled to a life interest in one third of such real estate by way of dower; (g) and such interest will (*semble*) take priority over the unsecured debts of her husband. (h)

- (a) The present law only applies to widows married since 1833 (*Dower Act*, 1833, s. 14). But the older law is now only of historical importance.

- (b) The *Dower Act*, 1833 (s. 3) expressly renders it unnecessary, for purposes of a claim to dower, that the husband should have obtained actual possession of the land. But the widow's claim against an adverse possessor must be enforced within the period during which the husband's claim might have been so enforced

- (*ibid.*). The interest of a joint tenant, however, which passes by survivorship, is not subject to dower (Co. Litt. 31 b). The older methods of barring dower were largely based on this rule.
- (c) Claims to dower (or 'freebench') in copyholds are, *semble*, still governed by the custom of the manor (*Shaw v. Thompson* (1595) 4 Rep. 30 b; *Smith v. Adams* (1854) 5 De G. M. & G. 712); and local custom (e. g. gavelkind) still occasionally regulates the widow's claim to dower in socage. Gavelkind is, however, for some purposes, within the Act of 1833 (*Farley v. Bonham* (1861) 2 J. & H. 177).
 - (d) There can be no claim to dower out of a true reversion (*ante*, Bk. III, Sect. I, Tit. VIII, § 1167) or an interest *in futuro*; because the land could not have been set out by metes and bounds.
 - (e) Dower Act, 1833, s. 2.
 - (f) It is not necessary that it should be strictly an 'estate of inheritance in possession,' if it is equal thereto (*ibid.*, and *Re Michell* [1892] 2 Ch. 87). It is submitted that the criterion stated in the text is the correct one.
 - (g) Litt., s. 36.

[The amount of dower and freebench in copyhold and other customary estates is fixed by the custom (Litt., s. 37). In gavelkind lands the widow gets a half, but only *dum sola et casta* (Co. Litt. 33 b). The liability of incorporeal hereditaments (*ante*, Bk. III, Sect. I, Tit. IX) to dower is not clear. But Coke enumerates (Co. Litt. 32 a) certain franchises and freehold offices, tithes, commons, fisheries, rents, and advowsons, as liable. And it has been decided that a widow is entitled to dower out of shares in companies which are real estate (*Buckeridge v. Ingram* (1795) 2 Ves. Jun. 652).]

- (h) *Spyer v. Hyatt* (1855) 20 Beav., at p. 623, *per* Romilly, M. R.
Jones v. Jones (1858) 4 K. & J., at pp. 366-7, *per* Wood, V. C.

[These cases are, strictly speaking, *dicta* only, as regards this important point. But they were expressly followed by the High Court in Ireland in *Northern Bank v. McMackin* [1909] 1 Ir. R. 374, notwithstanding the words of s. 5 of the Dower Act.]

2081. In practice a claim to dower is satisfied by obtaining from the deceased's heir one third of the annual rents and profits of the land subject to dower.^(a) But the dowress has a right to an assignment of one

*Assignment
of dower*

third in value of such land by the Court, and will then be able to recover possession of it by ejectment.^(b)

- (a) *Williams v. Thomas* [1909] 1 Ch. 713 (where the modern practice is fully explained).

[This method of satisfaction supersedes the old right of 'quarantine' (Co. Litt. 32 b).]

- (b) *Bamford v. Bamford* (1845) 5 Ha. 203.

Williams v. Thomas, ubi sup. (The valuation will be as at the time of the assignment, not the husband's decease.)

[If the land is sold by the personal representative of the deceased (with the widow's consent?) the widow is not entitled to a lump sum out of the purchase-money as compensation for dower, but only to her proper share of the income (*Re Wilson* [1916] 1 Ch. 220).]

*Time for
claim*

2082. The claim of a widow to dower (previous to assignment) is not barred by any Statute of Limitation; but if she makes no claim for twelve years from her husband's decease, the Court will refuse her relief on the ground of laches.^(a) The statutory period begins to run against her as from the date of the assignment;^(b) and, in any case, only six years' arrears of rents and profits can be recovered by her against the heir.^(c)

- (a) *Marshall v. Smith* (1865) 5 Giff. 37, as interpreted by *Williams v. Thomas, ubi sup.*

- (b) *Williams v. Thomas, ubi sup.*, at p. 725, *per* Fletcher Moulton, L. J.

- (c) Real Property Limitation Act, 1833, s. 41.

Bamford v. Bamford, ubi sup.

*Position of
dowress*

2083. A dowress has the rights and liabilities of a tenant for life at the common law and in equity;^(a) and the powers of leasing conferred by s. 46 of the

Settled Estates Act, 1877 (*ante*, Bk. III, Sect. VI, Tit. II, § 1495).^(b)

(a) Bl. *Comm.* II, 122.

[For these powers and liabilities, see *ante*, Bk. III, Sect. I, Tit. IV.]

(b) Settled Estates Act, 1877, s. 46.

[*Semle*: a dowress is not a 'tenant for life' for the purposes of the Settled Land Acts.]

2084. A widow's claim to dower is barred (i. e. *Barring of dower* defeated) by:—

- (i) any absolute disposition of the estate out of which it is claimed, by her husband in his lifetime or by his testament;

Dower Act, 1833, s. 4.

- (ii) any declaration in the deed by which the estate was conveyed to her husband, or in any deed executed by him, that his widow should not be entitled to dower out of such estate;

Ibid., s. 6.

[Apparently, the declaration need not be by the husband.]

- (iii) any declaration in her husband's testament that she shall not be entitled to dower out of such estate or out of any of his land;

Ibid., s. 7.

- (iv) any devise by her husband to her, or for her benefit, of any real estate out of which

she would be entitled to claim dower if the same were not so devised,^(a) or of any interest therein,^(b) unless a contrary intention is declared by the testament;

(a) *Ibid.*, s. 9.

(b) Thus, a devise of any such real estate on trust for sale, with a trust for the widow of any part of the proceeds, will bar her right to dower (*Lacey v. Hill* (1875) L. R. 19 Eq. 346; *Thomas v. Howell* (1886) 34 Ch. D. 166).

(v) any settlement executed by the widow (being then of full age^(a)) prior to her marriage with the deceased, whereby provision was expressed^(b) to be made for her in lieu of her claim to dower;^(c)

(a) *Caruthers v. Caruthers* (1794) 4 Bro. C. C., at p. 511, *per* Lord Alvanley, M. R.

[Would a settlement made by her under the provisions of the Infants Settlement Act, 1855 (*ante*, Bk. III, Sect. VII, Tit. I, § 1500) be deemed effectual for this purpose?]

(b) *Vernon's Case* (1572) Dyer, 317 a.

Charles v. Andrews (1725) 9 Mod. 151.

(c) *Dyke v. Rendall* (1852) 2 De Gex M. & G. 209.

(vi) any reasonable provision made for her in lieu of dower by any settlement made prior to the marriage, even though she was then under age;

Caruthers v. Caruthers, *ubi sup.*, at p. 513, *per* Lord Alvanley, M. R.
Corbet v. Corbet (1824) 1 Sim. & St. 612.

[The Statute of Uses (ss. 4, 5) laid down certain conditions as to the validity of a pre-nuptial jointure as a bar of dower; and these sections are explained by Coke in a well-known passage (Co. Litt. 36 b). But Courts of Equity were inclined to accept provisions not strictly complying with the statute, if they were reasonable (*Dyke v. Rendall*, *ubi sup.*).]

- (vii) any provision accepted by a wife (*semble*, of full age) married after 1882, during the marriage, in lieu of dower;

Married Women's Property Act, 1882, ss. 1, 2.

[A provision accepted during marriage in lieu of dower by a woman married before 1882 is not binding on her; but she will be required after her husband's death to elect between it and her claim to dower (Statute of Uses, s. 7; *Slatter v. Slatter* (1833) 1 Yo. & C. Ex. 36). As to election see *ante*, Sect. I, Tit. IV, §§ 2021-2025.]

- (viii) any joinder by the wife during the marriage in any disposition by the husband, for the purpose of releasing her claim to dower;

Dawson v. Bank of Whitehaven (1877) 6 Ch. D. 218.

[In this case the marriage had taken place before 1833 (Dower Act); and a release would now be unnecessary. Presumably, however, if the marriage took place before 1883, the wife's release would only be effectual if it were by deed acknowledged; though it is not stated in *Dawson v. Bank of Whitehaven* that the wife's release was so effected.]

- (ix) a decree absolute for dissolution of the marriage;

Frampton v. Stephens (1882) 21 Ch. D. 164.

[A decree of judicial separation has not that effect (*ibid.*, at pp. 167-8, *per* Fry, J.).]

- (x) the voluntary leaving of her husband and continuing adultery by the wife, unless her husband has subsequently voluntarily been reconciled to her.

Statute of Westminster II (1285) st. I, c. 34.

[The fact that the leaving of the husband was with the husband's consent (*Hethrington v. Graham* (1829) 6 Bing. 135), or caused by

his cruelty (*Woodward v. Dowse* (1861) 10 C. B. N. S. 722; *Bostock v. Smith* (1864) 34 Beav. 57) is immaterial for this purpose.]

[The provisions of this § appear to extend generally to claims of dower in gavelkind (*Farley v. Bonham* (1861) 2 J. & H. 177). But copyholds are not within the Dower Act (*Powdrell v. Jones* (1854) 2 Sm. & G. 407; *Smith v. Adams* (1854) 5 De G. M. & G. 712); and it is said that, for even an ante-nuptial settlement to deprive a widow of her freebench in copyholds, there must be a clear intention to that effect in the settlement (*Willis v. Willis* (1865) 34 Beav. 340).]

*Claims
prior to
dower*

2085. A widow's claim to dower at common law is subject to:—

- (i) all partial estates and interests, and all charges created by any disposition or testament of her husband;

Dower Act, 1833, s. 5.

- (ii) all debts, incumbrances, contracts, and engagements to which the estate out of which it is claimed is subject or liable;

Ibid.

[This provision does not, *semble*, postpone the widow's dower to the unsecured debts of the husband, though these are now payable out of his real estate (*ante*, § 2080). And it is the better opinion, that if a widow joins in a mortgage of her deceased husband's estate, she only postpones her claim to that of the mortgagee, unless an intention to release it entirely appears (*Meek v. Chamberlain* (1881) 8 Q. B. D. 31, distinguishing *Dawson v. Bank of Whitehaven*, *ubi sup.*, which was decided on the old law).]

- (iii) any conditions, restrictions, or directions declared by the testament of her husband.

Ibid., s. 8.

2086. A gift or bequest made by a husband to or for the benefit of his widow out of his personal estate, or out of any of his 'land' not liable to dower,^(a) does not defeat or prejudice her right to dower; unless a contrary intention appears by the testament.^(b)

*Legacies
do not bar
dower*

- (a) Presumably this means immovables to which dower does not attach at common law or by custom, e. g. leaseholds or estates *pur autre vie*, not real estate *prima facie* subject to dower which has been conveyed to the husband with a declaration against dower (*ante*, § 2084 (ii)).

- (b) Dower Act, 1833, s. 10.

2087. A Court of Equity will enforce a covenant or agreement entered into by or on behalf of the husband not to bar his wife's dower.

*Agreement
not to bar
dower*

Ibid., s. 11.

2088. The claim of a widow to dower is in addition to her claim to a share of her husband's personal estate under the Statutes of Distribution^(a) (*ante*, Tit. III, § 2065) and (subject to § 2079, n.) to her claim under the Intestates Estates Act, 1890.^(b)

*Dower in
addition to
other claims*

- (a) *Couch v. Stratton* (1799) 4 Ves. 391.

- (b) Intestates Estates Act, 1890, s. 4.
Re Charrière [1896] 1 Ch. 912.

TITLE V—SUCCESSION ON FAILURE OF HEIRS AND NEXT OF KIN

Escheat

2089. When a person dies intestate and without heirs^(a) as to any fee simple interest,^(b) whether legal or equitable, corporeal or incorporeal,^(c) to which he is solely and beneficially entitled otherwise than as a mortgagee,^(d) the interest, subject to claims to dower or curtesy (*ante*, Tit. IV), to the debts of the intestate,^(e) and to the interest (if any) of the deceased's personal representative,^(f) passes by escheat to the next lord of the fee, and, failing him,^(g) to the next superior lord, and so on, and ultimately to the Crown.^(h)

(a) It will be remembered that if the heirs traced from the purchaser fail, it is still possible that heirs traced from the deceased himself may succeed (*ante*, Tit. II, § 2052).

(b) Estates tail and base fees (*ante*, Bk. III, Sect. I, Tit. III) do not escheat, but come to an end, on failure of the heirs in tail, for the benefit of the reversioner or remainderman. As to estates *pur autre vie*, see *post*, § 2091.

(c) Intestates Estates Act, 1884, s. 4.

[Before this Act, the benefit of equitable interests for which no claimant could be found was usually taken by the owners of the legal estate (*Burgess v. Wheate* (1759) 1 W. Bl. 123).]

(d) This seems to be the construction placed on ss. 26 and 29 of the Trustee Act, 1893. In any case the interest of the *cestui que trust* or mortgagor could not be affected by an escheat of the interest of the trustee or mortgagee.

(e) Administration of Estates Act, 1833.

Evans v. Brown (1842) 5 Beav. 114.

[It seems a little doubtful how far the claim to an escheat by the Crown, which is not expressly bound by the Act of 1833, will be subject to payment of the deceased's debts (*Goods of Ball* [1902] W. N. 226).]

(f) Land Transfer Act, 1897, s. 2 (1).

[Where the Crown takes by escheat, the estate does not pass to the personal representative (*Goods of Hartley* [1899] P. 40).]

(g) Presumably, the title of any mesne lord not under disability will be barred at the expiry of twelve years from the intestate's death, but not sooner.

(h) Co. Litt. 13 a.

[Owing to the operation of the Statute *Quia Emptores* (18 Edw. I (1290) st. I, cc. 1-3), *ante*, Bk. III, Sect. I, Tit. II, § 1044, the claims of mesne lords to escheat in socage have become rare; and it is difficult to see how any person but the Crown could claim under the Act of 1884 (*supra*), for there can be no lord of an incorporeal hereditament or an equitable interest. But, in the case of copyhold or recently enfranchised estates (*ante*, Bk. III, Sect. I, Tit. V, § 1112 (i)), there is usually no difficulty in finding a mesne lord; and the rights of such person to an escheat of enfranchised land are expressly saved by the Copyhold Act, 1894, s. 21 (1) (b).]

2090. No grant of any interest alleged to be escheated may be made by the Crown until an inquisition has been held and the title thereto found. Such inquisition must find of whom the interest was held.

*Grants of
escheated
land*

Escheat Procedure Act, 1887, s. 2 (2) (3) (5).

2091. When a person dies intestate as to any personal estate (including an estate *pur autre vie*),^(a) and there is no widow or next of kin or special occupant who is entitled to claim such estate under the pro-

*Bona
vacantia*

visions of Titles II, III and IV, *ante*, such estate will pass to the Crown as *bona vacantia*; ^(b) unless it is vested in the executors of the deceased, and such executors are not expressly or by implication excluded by the testament of the deceased from taking it beneficially. ^(c)

(a) It seems to be clear that an estate *pur autre vie* limited to a special occupant passes as personalty if no special occupant can be found (Wills Act, 1837, s. 6).

(b) *Hensloe's Case* (1600) 9 Rep. 38 b.
Dyke v. Walford (1846) 5 Moo. P. C. 434.

[Of course it will be subject to payment of the deceased's debts, for there is no surplus until such debts are paid (*Kane v. Reynolds* (1854) 4 De G. M. & G., at p. 571, *per* Lord Cranworth, C.).]

(c) Executors Act, 1830, s. 2.
Russell v. Clowes (1846) 2 Coll. 648.
Re Bacon's Will (1886) 31 Ch. D. 460.
A. G. v. Jeffreys [1908] A. C. 411.

[Before the passing of the Executors Act, 1830, the presumption was that executors took undisposed of residue even against next of kin, unless evidence to the contrary appeared in the will (see preamble to the Act). The Act abolishes this presumption as regards the next of kin, but not as regards the Crown. Where there are no executors, *semble*, personal estate not effectively disposed of by the will passes to the Crown as *bona vacantia*. This consequence seems to follow from the wording of the preamble to the Executors Act, 1830, which was itself based upon the old view, that there was no true testament unless there was an executor (*Lyndewode, Provinciale*, 172 (*sub voc.* Intestatis), 173 (*sub voc.* Voluntatem ultimam); Swinburne, *Testaments*, Pt. I, § 3, par. 19).]

SECTION III

ADMINISTRATION OF ASSETS

TITLE I — THE PERSONAL REPRESENTATIVE

2092. A personal representative is either an executor, an administrator, or an executor *de son tort*. *Classes of representatives*

2093. An executor is a personal representative appointed by testament to administer the estate of the testator in accordance with the lawful directions contained in the testament. *Executor*

Farrington v. Knightley (1719) 1 P. Wms., at pp. 548-9.
Brownrigg v. Pike (1882) 7 P. D., at p. 64.

2094. An administrator is a personal representative appointed by the Probate, Divorce, and Admiralty Division of the High Court,^(a) in the circumstances described in §§ 2103, 2105-2108, to distribute the estate of the deceased in accordance with the law,^(b) or with the terms of the deceased's testament, if any.^(c) *Administrator*

(a) 31 Edw. III (1357) st. I, c. 11.
21 Hen. VIII (1529) c. 5, s. 2.
Court of Probate Act, 1857, s. 4.
Judicature Act, 1873, s. 16.

- (b) 31 Edw. III (1357) st. I, c. 11.
- (c) An administrator *cum testamento annexo* (*post*, § 2107) and an administrator *de bonis non administratis* (*post*, § 2103) may have to follow the directions of a testament; and a similar rule may apply to other limited grants of administration.

*Executor
de son tort*

2095. An executor *de son tort* is a person who, without being either an executor or an administrator, takes upon himself to do acts in relation to the property of a deceased person which only an executor or administrator has authority to do.

Peters v. Leeder (1878) 47 L. J. (Q. B.) 573.
Wentworth, Office of Executor (14th edn.) p. 320.

*Appoint-
ment of
executor*

2096. An executor is appointed either (i) expressly by the testator in his testament or by another person upon whom authority to do so has been conferred by the testament,^(a) or (ii) by implication, when on the construction of the testament it appears that a person has been given authority by the testator to pay debts or to perform other functions appropriate to the office of an executor.^(b) ('Executor according to the tenor.')

(a) *Goods of Deichman* (1842) 3 Curt. 123.

[Such a person may nominate himself (*Goods of Ryder* (1861) 2 Sw. & Tr. 127).]

(b) *Goods of Punchard* (1872) L. R. 2 P. & M. 369.
Goods of Adamson (1875) L. R. 3 P. & M. 253.
Goods of Pryse [1904] P. 301.
Estate of Mackenzie [1909] P. 305.
Irwin v. Caruth [1916] P. 23.

[If there is any doubt as to the identity of the person appointed, the Court looks at the circumstances of the testator to decide (*Grant v. Grant* (1869) L. R. 2 P. & M. 8), but will not admit direct evidence of the testator's intention, except in a case of equivocation, i. e. where the description in the will is equally applicable to two or more persons (*Estate of Hubbuck* [1905] P. 129). The same rule applies to the case of legatees (*Re Ofner* [1909] 1 Ch. 60), and of devisees (*Re Halston* [1912] 1 Ch. 435). If the identity of the person appointed cannot be established, the appointment is void for uncertainty (*Goods of Blackwell* (1877) 2 P. D. 72).]

2097. Any person may be appointed an executor. *Capacity to act as executor*
But if a lunatic (whether so found or not^(a)), or an infant,^(b) is appointed sole executor, the Court will make a grant of administration during the lunacy^(c) or infancy^(d) to some other person. If a bankrupt is appointed sole executor, or a sole executor becomes bankrupt, the Court will appoint a receiver of the deceased's estate;^(e) unless (*semble*) the testator knew of the bankruptcy when he made his testament.^(f) If a solvent executor, who is willing to act, is also appointed, the Court will restrain the bankrupt from acting,^(g) unless (*semble*) the testator was aware of his bankruptcy.^(h)

(a) *Goods of Crump* (1820) 3 Phill. 497.

Ex parte Evelyn (1833) 2 My. & K., at p. 4.

(b) *Foxwist v. Tremain* (1669) 1 Mod. 47, *per* Twisden, J.

Goods of Marshall (1836) 1 Curt. 297.

(c) *Goods of Phillips* (1824) 2 Add. 336 n. (b).

(d) Administration of Estates Act, 1798, s. 6.

[The age of majority for this purpose was formerly seventeen. By s. 6 of this Act it is fixed at twenty-one. The Court's discretion in making grants during lunacy or infancy is absolute (*Goods of*

Hastings (1878) 4 P. D. 73; *Goods of Gardiner* (1884) 9 P. D. 66).]

(e) *Re Hopkins* (1881) 19 Ch. D. 61.

[Apparently this is a modern process (*Hills v. Mills* (1691) 1 Salk. 36; *R. v. Raynes* (1698) *ib.* 299.).]

(f) *Stainton v. Carron Co.* (1853) 18 Beav., at p. 161, *per* Romilly, M. R.

(g) *Bowen v. Phillips* [1897] 1 Ch. 174.

(h) *Gladdon v. Stoneman* (1808) 1 Madd. 143 n.

[A corporation can be appointed as an executor; but, if a corporation aggregate is appointed, it nominates a person to take administration with the testament annexed (*Goods of Darke* (1859) 1 Sw. & Tr. 516; *Goods of Hunt* [1896] P. 288). A corporation sole (e. g. The Public Trustee) can take a direct grant (*Re Haynes* (1842) 3 Curt. 75; Public Trustee Act, 1906, ss. 1, 6 (1)).]

General
and special
executors

2098. The appointment of an executor may be general, or it may be limited as to property,^(a) as to place,^(b) or as to duration;^(c) or it may be made subject to a condition precedent,^(d) or determinable upon the happening of a condition subsequent.^(e)

(a) *Rose v. Bartlett* (1632) Cro. Car., at p. 293.

Goods of Harris (1870) 2 P. & M. 83.

Irwin v. Caruth [1916] P. 23.

(b) *Re Cohen's Executors* [1902] 1 Ch., at p. 188.

Irwin v. Caruth, ubi sup. (executor according to the tenor).

(c) *Graysbrook v. Fox* (1565) Plowd., at fo. 279, *per* Weston, J. Swinburne, *Testaments*, Pt. IV, § 17, par. 1.

(d) *Goods of Langford* (1867) L. R. 1 P. & M. 458.

Goods of Foster (1871) L. R. 2 P. & M. 304.

(e) *Jenning's and Gower's Case* (1589) Cro. Eliz. 219.

Bond v. Faikney (1757) 2 Ca. temp. Lee, 371.

Goods of Lane (1864) 33 L. J. (P. M. & A.) 185.

Refusal
of office

2099. A person appointed executor may refuse the office; even though he has promised the testator to

accept.^(a) If he will not decide whether to accept or refuse, he may be cited by creditors or legatees before the Court and compelled to decide. If he does not appear when cited, he will be treated as if he had refused.^(b)

(a) *Doyle v. Blake* (1804) 2 Sch. & Lef., at p. 239.

[As to the method of refusal, see *post*, § 2102.]

(b) Court of Probate Act, 1858, s. 16.

2100. An executor accepts office either by taking out probate,^(a) or by ‘intermeddling’ — i. e. doing acts, which only an executor has authority to do.^(b) Neither an act of necessity,^(c) nor the collection of information as to the condition of the estate,^(d) constitutes acceptance of office.

(a) *Mohamidu Mobideen Hadjar v. Pitchey* [1894] A. C. 437.

[A mere application for probate is not conclusive (*ibid.*).]

(b) *Long v. Symes* (1832) 3 Hagg. Eccl. 771 (advertising for creditors).
Vickers v. Bell (1864) 10 Jur. N. S. 376 (defending administration suit).

Re Stevens [1897] 1 Ch. 422 (payment of interest to creditor).

(c) *Long v. Symes*, *ubi sup.*, per Sir John Nicholl.

(d) Godolphin, *Orphan's Legacy* (2nd edn.), p. 102.

[An executor wishing to ‘take out probate’ must (i) carry into the Probate Registry the original will and codicils (if any), along with a copy engrossed on specially prepared paper; (ii) take the executor’s ‘oath’ of office, which verifies the will and the testator’s death, and undertakes duly to administer the estate; and (iii) make an affidavit containing particulars of the testator’s property for the purpose of enabling the Inland Revenue Commissioners to calculate the amount of the Death Duties payable. After the affidavit has been passed at the Estate Duty Office, a ‘grant’ of probate under

the seal of the Court is annexed to the engrossed copy of the will and codicils (if any); and the combined documents become, in effect, the official authority of the executor for performing the duties of his office. This is 'probate in common form,' and is sufficient if everything is in order. But if the original will cannot be found, or there is a dispute as to the genuineness or validity of the will which is set up by the executor, it becomes necessary to 'establish' the will by 'probate in solemn form,' which involves the formal proof of the will before the Court and a jury (or the Court acting as a jury).]

No renunciation after acceptance

2101. An executor who has accepted office cannot renounce probate,^(a) and can be compelled to take a grant.^(b)

(a) *Goods of Badenach* (1864) 3 Sw. & Tr. 465.

(b) *Goods of Davis* (1860) 4 Sw. & Tr. 213.

[There is an old authority for saying that acceptance cannot be as to part of the estate; unless the appointment is limited in accordance with § 2098, *ante* (*Paul v. Moodie* (1620) 2 Roll. Rep., at p. 132).]

Renunciation of probate

2102. An executor refuses office by filing a renunciation of probate (which need not be under seal)^(a) in the Court.^(b) A renunciation of probate completely severs the connection of the person renouncing with the estate; and the representation of the testator devolves as if such person had never been appointed executor.^(c) A renunciation cannot be retracted, except by leave of the Court;^(d) and the Court, in granting or refusing leave, exercises an absolute discretion.^(e)

(a) *Goods of Boyle* (1864) 3 Sw. & Tr. 426.

(b) *Goods of Morant* (1874) L. R. 3 P. & M. 151.

[Until the renunciation is filed, it is not absolutely binding (*ibid.*). For an executor who will neither act nor renounce, see *ante*, § 2099.]

- (c) Court of Probate Act, 1857, s. 79.
- (d) *Melville v. Ancketill* (1909) XXV T. L. R. 655.
- (e) *Goods of Gill* (1873) L. R. 3 P. & M. 113.
- Goods of Stiles* [1898] P. 12.

2103. On the death of one of several executors before the administration of the estate is complete, his office devolves on the survivor or survivors;^(a) and on the death of a sole or a last surviving executor who has proved the testament, his office devolves upon his executor.^(b) If such sole surviving executor dies intestate, or without having appointed an executor, the Court makes a grant of administration *de bonis non administratis* of his testator.^(c)

*Devolution
of executor-
ship*

- (a) *Flanders v. Clarke* (1747) 3 Atk., at p. 510.
- (b) *Wankford v. Wankford* (1700) 1 Salk., at pp. 305, 308, *per* Holt, C. J.
- (c) *Ibid.*, at p. 305. (If the sole or surviving executor has not proved the testament, a grant of administration *cum testamento annexo* is made (*ibid.*); and for this and other cases in which such a grant is made, see *post*, § 2107.)

[The general executor of a special executor (*ante*, § 2098) represents the latter's testator (*Goods of Beer* (1851) 2 Rob. Eccl. 349); but the converse proposition does not hold (*Goods of Bridger* (1878) 4 P. D. 77). For the case of an executor who, after taking out probate, becomes incapable of acting, or disappears, see *post*, Tit. II, § 2124.]

2104. The office of executor or administrator is not assignable;^(a) but, with the sanction of

*Executor-
ship not
assignable*

the Court, it may be transferred to the Public Trustee.^(b)

(a) *Bedell v. Constable* (1664) Vaugh., at p. 182.

(b) Public Trustee Act, 1906, s. 6 (2).

*Letters of
adminis-
tration*

2105. When a person dies, leaving within the jurisdiction of the Court^(a) property which devolves upon his personal representative, and leaving either no testament, or no operative testament,^(b) the Court makes a general grant of administration.

[Letters of administration (equivalent to the grant of probate to an executor) are obtained by application to the Probate Registry by the person deeming himself to be entitled. He must (i) make an affidavit which states the necessary facts, including the grounds of the applicant's claim; (ii) make the Inland Revenue affidavit (*ante*, § 2100, n.); (iii) enter into a bond with a surety or sureties for the due performance of his office; (iv) when the application is necessitated by the testator's failure to appoint an executor, or the death or refusal to act of the executors appointed, carry in the original will and codicils (if any), and an engrossed copy thereof (*post*, § 2107). The rules which will guide the Court in granting administration, general or special, are stated in § 2106, *post*.]

(a) *Goods of Tucker* (1864) 3 Sw. & Tr. 585.

(b) *Re Ford* [1902] 2 Ch. 605.

[A general grant of administration is also made when, an action having been begun to set aside an alleged testament, the defendant fails to appear (*Goods of Quick* [1899] P. 187); and when the executor of an alleged testament, being cited to produce it, fails to appear (*Goods of Dennis, ibid.* 191).]

*Order of
claim to
adminis-
tration*

2106. The following persons are entitled to apply to the Court for a general grant of administration according to the following rules:—

- (i) A widower has the first right to be appointed administrator of his wife's property (*ante*, Sect. II, Tit. IV, § 2077); but if she has left real estate, the Court may prefer her heir at law or make a joint grant to the heir at law and the widower.

Land Transfer Act, 1897, s. 2 (4).

Goods of Ardern [1898] P. 147.

Goods of Roberts, *ibid.* 149.

[If husband and wife perish at the same time, grants are made to their respective next of kin (*Goods of Beynon* [1901] P. 141).]

- (ii) The widow and the next of kin of a deceased person have an equal right to a grant; and the Court may make it to either or both.^(a) But the Court usually makes a grant to the widow;^(b) unless there is good reason why it should not.^(c)

(a) 21 Hen. VIII (1529) c. 5, s. 3.

(b) *Webb v. Needham* (1823) 1 Add. 494.

(c) *Goods of Stevens* [1898] P. 126.

- (iii) In choosing amongst the next of kin, the guiding principle adopted by the Court is the interest of the estate.

Warwick v. Greville (1809) 1 Phill., at p. 125, *per* Sir John Nicholl.

[For the numerous detailed rules which the Court has applied to decide between the conflicting claims of the next of kin *inter se*, see Williams, *Executors* (10th edn.), pp. 334-337.]

- (iv) If there is real estate, the heir at law of the deceased, if he is not one of his next

of kin, is entitled to a grant equally with the next of kin.

Land Transfer Act, 1897, s. 2 (4).

- (v) If there is no next of kin, the Crown is entitled to a grant of administration of the personal estate of the deceased.

Stote v. Tyndall (1757) 2 Lee, 394.
Treasury Solicitor Act, 1876, s. 2.

[The grant is limited to personal estate, as the Land Transfer Act, 1897, does not bind the Crown (*Goods of Hartley* [1899] P. 40). If the deceased was resident in the Duchy of Lancaster, the grant is made to the Solicitor to the Duchy (Treasury Solicitor Act, 1876, s. 9 (1); Intestates Estates Act, 1884, s. 8); and if in Cornwall, to the nominee of the Duke of Cornwall (*Solicitor to Duchy of Cornwall v. Canning* (1880) 5 P. D. 114).]

- (vi) The Public Trustee is considered by the Court as entitled to a grant of administration equally with any other person or class of persons; but he will be postponed to the widower, widow, or next of kin of the deceased, unless good cause is shown to the contrary.

Public Trustee Act, 1906, s. 6 (1).
Public Trustee Rules, 1912, R. 6 (1) (b).

- (vii) If none of the persons above mentioned are willing to take a grant, a grant may be made to a creditor of the deceased.

Elme v. Da Costa (1791) 1 Phill., at p. 177.

[Before such a grant is made, the Court generally requires all other persons (except the Public Trustee) entitled to the grant to be cited to accept or refuse (*Goods of Barker* (1837) 1 Curt. 592);

though this requirement may be dispensed with, and a grant made under rule (viii) below (*Goods of Atherton* [1692] P. 104).]

(viii) If the estate is insolvent, or if any other special circumstances exist, the Court may make a general or a limited grant to such person as it thinks fit.

Court of Probate Act, 1857, s. 73. †

[The consent of all the parties interested is not by itself sufficient to induce the Court to exercise its powers under this section (*Goods of Richardson* (1871) L. R. 2 P. & M. 244). The question whether such special circumstances exist as will induce the Court to exercise its powers must be decided on the facts of each case as it arises (see *Goods of Moore* [1892] P. 145; *Goods of Jackson*, *ibid.* 257; *Goods of Trigg* [1901] P. 42).]

2107. The Court will make a grant of administration *cum testamento annexo*, if a testator has not appointed an executor, expressly or by implication, by his testament;^(a) or if an appointment of an executor fails to take effect by reason either of the death of the executor before the testator,^(b) or before the executor has proved the testament,^(c) or of his renunciation or failure to appear when cited to take probate.^(d)

*Adminis-
tration
with will
annexed*

(a) *Graysbrook v. Fox* (1565) Plowd., at fo. 279.
Coke, 2 Inst. 397.

(b) *Pullen v. Serjeant* (1684-5) 2 Ch. Rep. 300.
Goods of McAuliffe [1895] P. 290.

(c) *Wankford v. Wankford* (1702) 1 Salk., at p. 308.

(d) *Garrard v. Garrard* (1871) 2 P. & M. 238.

[It may be necessary sometimes to make such a grant for a limited period, e. g. if the executor appointed by the testament is not

to take office till after a stated time from the death (*Graysbrook v. Fox, ubi sup.*, at fo. 279).]

*Order of
claim*

2108. The Court has an absolute discretion in making a grant under § 2107;^(a) but it usually appoints the person who has the largest interest in the estate.^(b) The provisions of § 2106 (vi) and (viii) apply to such grants; and a grant can be made under § 2106 (viii), if a sole executor is at the time of the death resident out of the United Kingdom,^(c) or incapable, owing to ill health, of taking probate.^(d)

- (a) *Rex v. Bettesworth* (1734) 2 Stra. 956.
Goods of Ewing (1881) 6 P. D., at pp. 24-5.
- (b) *Wetdrill v. Wright* (1814) 2 Phill., at p. 248.
- (c) Court of Probate Act, 1857, s. 73.
- (d) *Estate of Davis* [1906] P. 330.

[The grant was made in this case to the nominees of the executor; but a grant may be made limited to the period of the executor's incapacity (*Goods of Ponsonby* [1895] P. 287).]

*Supple-
mentary
grant*

2109. On the death or disappearance of an administrator before the administration of the estate is complete, the Court appoints an administrator *de bonis non administratis* of his deceased.^(a) In making such a grant, the Court usually follows the same principles as it followed in making the original grant.^(b)

- (a) *Estate of Saker* [1909] P. 233.
Bl. Comm. II, 506.
- (b) *Walton v. Jacobson* (1765) 1 Hagg. 346. (But when a husband obtains a grant of administration to his wife, and dies without hav-

ing fully administered, the new grant is made, not to the next of kin of the wife, but to the representative of the husband, because the latter's right to administer is a beneficial right (*Fielder v. Hanger* (1832) 3 Hagg. 769).)

2110. The provisions of § 2097, *ante*, apply, *mutatis mutandis*, if the person *primâ facie* entitled to a grant of administration is a minor,^(a) or a lunatic.^(b) The Court will not make a grant of administration to a bankrupt.^(c)

Capacity to act as administrator

- (a) *Cartright's Case* (1678) 1 Freem. K. B. 258. (But here the grant was made to a guardian though one of the persons entitled was of full age.)

[Usually the grant is made to the guardian of the minor. In the case of a minor under the age of seven (according to the rules of ecclesiastical law an 'infant'), the Court assigns the guardian. In the case of a minor over seven, the guardian is chosen by the minor (*Rich v. Chamberlayne* (1752) 1 Ca. temp. Lee, 134).]

- (b) *Ex parte Evelyn* (1833 2 My. & K. 3.

[The grant is usually made to the committee (*Goods of Phillips* (1824) 2 Add. 336 n. (b)).]

- (c) *Coates' Case*, quoted in *Hills v. Mills* (1692) 1 Salk. 36.

[Limited grants of administration are made *durante absentia* (Court of Probate Act, 1858, s. 18; *Goods of Suarez* [1897] P. 82); *pendente lite* (Court of Probate Act, 1857, ss. 70, 71); *ad colligenda bona* (Court of Probate Act, 1857, s. 73; *Whitehead v. Palmer* [1908] 1 K. B. 151); till a testament is brought to this country (*Goods of Metcalf* (1822)* 1 Add. 343), or till a lost testament is produced (*Goods of Wright* [1893] P. 21); limited to specific property, but only in exceptional cases (*Goods of Somerset* (1867) L. R. 1 P. & M. 350; *Goods of Ratcliffe* [1899] P. 110); or limited to specific acts (*Goods of Butler* [1898] P. 9). In certain exceptional cases, defined by statute, no representation to the deceased is needed; e.g. Army Pensions Act, 1830, s. 5; Loan Societies Act, 1840, s. 11; Army Prize (Shares of Deceased) Act, 1864, s. 3; Navy and Ma-

rines (Property of Deceased) Act, 1865, s. 6; Building Societies Act, 1874, s. 29; Provident Nominations and Small Intestates Act, 1883, s. 7; Superannuation Act, 1887, s. 8; Savings Bank Act, 1887, s. 3 (1); Industrial and Provident Societies Act, 1893, ss. 25, 26, 27 (1); Merchant Shipping Act, 1894, s. 176; Friendly Societies Act, 1896, ss. 56, 57.]

*Judicial
trustee*

2111. The Court may, on the application of an executor or administrator, or of a beneficiary, in the exercise of its discretion, appoint a judicial trustee (*ante*, Bk. III, Sect. XVII, Tit. II, § 1780) of the deceased's estate, either jointly with any other person, or as sole trustee.

Judicial Trustees Act, 1896, s. 1 (2).

[An executor or administrator may himself be appointed a judicial trustee (Judicial Trustee Rules, 1897, r. 25).]

*Executor
de son tort*

2112. If a person who is neither an executor nor an administrator performs an act of administration^(a) or otherwise intermeddles with the estate of a deceased person,^(b) he is an executor *de son tort*; and a person who intermeddles with the assets under the direction of an executor *de son tort* is himself an executor *de son tort*.^(c) But if the intermeddling with the estate is of such a kind that it would be justifiable in a finder of goods, and there is no intention to assert any dominion over the property, it will not make the person intermeddling an executor *de son tort*.^(d) And a person who receives payment of a debt

due to him,^(e) or property belonging to the deceased,^(f) from an executor *de son tort*, is not himself, by virtue of such receipt, an executor *de son tort*.

- (a) *New York Breweries Co. v. A.-G.* [1899] A. C. 62.
- (b) *Read's Case* (1604) 5 Rep. 33 b.
Edwards v. Harben (1788) 2 T. R., at p. 597, *per* Buller, J.
- (c) *A.-G. v. New York Breweries Co.* [1898] 1 Q. B., at p. 221, *per* Rigby, L. J.
- (d) *Sbarland v. Mildon* (1846) 5 Ha. 469.
Peters v. Leeder (1878) 47 L. J. (Q. B.), at p. 574, *per* Lush, J.
- (e) *Hursell v. Bird* (1891) 65 L. T. 709.
- (f) *Paull v. Simpson* (1846) 9 Q. B. 365. (But he might be liable if he took trust property with notice of the trust (*Hill v. Curtis* (1865) L. R. 1 Eq., at p. 101).)

[Whether or not a person has intermeddled is a question of fact for the jury; whether the intermeddling will make the intermeddler an executor *de son tort* is a question of law for the Court (*Padget v. Priest* (1787) 2 T. R., at pp. 99, 100, *per* Buller, J.).]

2113. If a person obtains the personal property of an intestate, or secures the release or discharge of any debt or duty owing to the intestate, without adequate consideration, or from an administrator to whom he has fraudulently procured a grant of administration to be made with this object, he will be liable as an executor *de son tort* to the extent of the value of the property so acquired or the debts or duties so released or discharged. But he may deduct all just debts due to him from the intestate at the time of his decease, and all payments made by him in due course of administration.

Statutory
executor
de son tort

43 Eliz. (1601) c. 8, s. 2.

[*Quære*: are the provisions of this enactment now applicable to real estate by virtue of the Land Transfer Act, 1897, s. 2 (2)?]

X X

Liability
of executor
de son tort

2114. An executor *de son tort* is under the same liabilities to the creditors^(a) and the beneficiaries^(b) of the estate as a rightful representative, to the extent of the property which has come to his hands;^(c) but, when sued by them, he can plead that he has fully administered,^(d) or that the claim is barred by the Statutes of Limitation,^(e) or that he has accounted to the rightful representatives before action brought,^(f) or that he has been acting for a person who has subsequently taken out administration.^(g)

- (a) *Rayner v. Koehler* (1872) L. R. 14 Eq. 262.
- Cooté v. Whittington* (1873) L. R. 16 Eq. 534.
- (b) 1 Rolle, *Ab.* 919, Executors, F. pl. 1.
- (c) *Cooté v. Whittington*, *ubi sup.*, at p. 647.
- (d) *Oxenham v. Clapp* (1831) 2 B. & Ad., at p. 314.

[*Semble*, the executor *de son tort* is not liable for breaches of covenants contained in a lease vested in the deceased at the time of his death, even if he takes possession; because the estate is not vested in him (*Stratford-on-Avon v. Parker* [1914] 2 K. B. 562).]

- (e) *Webster v. Webster* (1804) 10 Ves. 93.
- (f) *Oxenham v. Clapp*, *ubi sup.*, at pp. 314-5.
- Hill v. Curtis* (1865) L. R. 1 Eq. 90.
- (g) *Hill v. Curtis*, *ubi sup.*, at p. 100.

Authority
of executor
de son tort

2115. Acts done by an executor *de son tort* in a due course of administration are valid;^(a) and creditors and beneficiaries of the deceased get a good title to property thus duly transferred to them.^(b) An executor *de son tort* is liable to the rightful representative for such acts; but the damages recoverable against him will be nominal, unless the rightful representative has been thereby deprived of any of

his privileges.^(c) If property is transferred or any other act done by an executor *de son tort*, otherwise than in a due course of administration, the creditors and beneficiaries in whose favour such acts are done, cannot take advantage of such acts; and the rightful representative can recover the property or full damages therefor against them.^(d)

- (a) *Coulter's Case* (1599), at fo. 30 b.
Oxenham v. Clapp (1831) 2 B. & Ad., at p. 314.
- (b) *Parker v. Kett* (1702) 1 Ld. Raym., at p. 661.
Mountford v. Gibson (1804) 4 East, at pp. 446-7.
Thomson v. Harding (1853) 2 El. & Bl. 630.
- (c) *Graysbrook v. Fox* (1565) Plowd., at fo. 282.
Padget v. Priest (1787) 2 T. R., at p. 100.
Thomson v. Harding, ubi sup., at p. 639.
Bl. Comm. II, 508.
- (d) *Graysbrook v. Fox, ubi sup.*
Padget v. Priest, ubi sup., at p. 100.
Mountford v. Gibson, ubi sup., at pp. 446-7.

2116. The personal liability of an executor *de son tort*, who has wasted or converted to his own use the property of the deceased, can be enforced against his executors or administrators;^(a) but his liability as representative of the deceased does not pass to them.^(b)

Enforce-
ment of
liabilities

- (a) 30 Car. II (1677) st. I, c. 7, s. 2, made perpetual by 4 & 5 W. & M. (1692) c. 24, s. 11.
- (b) *Wilson v. Hodson* (1872) L. R. 7 Exch. 84.

2117. An executor *de son tort* cannot be compelled to take out letters of administration.

Cannot be
compelled
to admin-
ister

Goods of Davis (1860) 4 Sw. & Tr. 213.

X X 2

TITLE II—THE TITLE AND INTEREST OF THE PERSONAL REPRESENTATIVE

*Title of
executor*

2118. The title of an executor is derived from the testament;^(a) and all the property of the testator which devolves upon him vests in him at the testator's death.^(b) But the executor must obtain probate before he can establish his title to the property, or his right to perform the functions of an executor.^(c)

(a) *Comber's Case* (1721) 1 P. Wms. 766.

(b) *Woolley v. Clark* (1822) 5 B. & Ald. 744.

(c) *Smith v. Milles* (1786) 1 T. R., at p. 480.

Tarn v. Commercial Bank of Sydney (1884) 12 Q. B. D. 294.

Re Masonic Life Assurance Coy. (1885) 32 Ch. D. 373.

[The rule that the representative can bring trespass for wrongs to the deceased's chattels before probate (*Oughton v. Seppings* (1830) 1 B. & Ad., at p. 244) but not trover (*Pinney v. Pinney* (1828) 8 B. & C. 335), illustrates this principle. In the former case, the representative is in possession of the deceased's property, and proof of his title is not necessary; in the latter case, proof of his title is (generally) necessary.]

*Title of
adminis-
trator*

2119. The title of the administrator is derived^(a) and (subject to § 2120) dates^(b) from the grant of administration. In the interval between the death and the grant of administration, the personal estate of the deceased is vested in the President of the Probate, Divorce, and Admiralty Division of the High

Court;^(c) and the real estate is vested in the heir or devisee.^(d)

- (a) *Comber's Case* (1721) 1 P. Wms. 766.
- (b) *Woolley v. Clark* (1822) 5 B. & Ald. 744.
- (c) Court of Probate Act, 1858, s. 19.
Judicature Act, 1873, s. 3.
- (d) *John v. John* [1898] 2 Ch., at pp. 576-7.

2120. When a grant of administration has been made, the title of the administrator relates back to the death for the following purposes:—

*Relation
back*

- (i) to enable the administrator to sue for wrongs committed in respect of the property of the deceased between the death and the grant;

Tharpe v. Stallwood (1843) 5 M. & G. 760.
Foster v. Bates (1843) 12 M. & W., at p. 233, *per* Parke, B.
Goods of Pryse [1904] P., at p. 305.

- (ii) to validate dispositions of the deceased's property,^(a) or contracts affecting such property,^(b) made or entered into by the administrator during the same period, provided that they are for the benefit of the estate, and in a due course of administration;^(c)

- (a) *Morgan v. Thomas* (1853) 8 Exch., at p. 307, *per* Parke, B.
- (b) *Foster v. Bates*, *ubi sup.*
- (c) *Whitehall v. Squire* (1691) 1 Salk. 295.
Morgan v. Thomas, *ubi sup.*
Foster v. Bates, *ubi sup.*
Re Watson (1886) 18 Q. B. D. 116.

- (iii) to enable the administrator to claim as adverse possessor under the Real Property Limitation Act (*ante*, Bk. III, Sect. IV, Tit. IV, §§ 1429-1436).

Real Property Limitation Act, 1833, s. 6.

[But as no right of action accrues to the administrator till the grant, the six years fixed by the Limitation Act, 1623, s. 3, do not begin to run as against him until the grant is made (*Murray v. East India Coy.* (1821) 5 B. & Ald. 204; *Pratt v. Swaine* (1828) 8 B. & C. 285).]

But the doctrine of relation back does not apply so as to expose the estate to liability for work done without the authority of the administrator;^(a) nor (*semble*) to divest any rights belonging to third parties which have come into existence between the date of the death and the date of the grant.^(b)

- (a) *Re Watson* (1887) 19 Q. B. D. 234.

[But the administrator can ratify acts done without authority if they are for the benefit of the estate, and done in a due course of administration (*Foster v. Bates* (1843) 12 M. & W. 226); though not otherwise (*Re Watson* (1886) 18 Q. B. D. 116; (1887) 19 Q. B. D. 234).]

- (b) *Waring v. Dewberry* (1717) cited in argument in *Rex v. Mann* (1726) Gilb. Eq. Rep. 223-4.

Possession
and title

2121. The possession of chattels personal,^(a) and the title to reversionary interests in chattels real,^(b) and (*semble*) incorporeal hereditaments, remainders, reversions, and executory interests in socage,^(c) vest in the executor or administrator from the date of the

death or the grant of administration respectively; the possession of land vests as from the date of entry upon the land.^(d)

- (a) *Smith v. Milles* (1786) 1 T. R., at p. 480.
- (b) *Prattle v. King* (1681) Sir T. Jones, 169.
- (c) Land Transfer Act, 1897, s. 1 (1).
- (d) *Ibid.*
Rendall v. Andreae (1892) 61 L. J. (Q. B.) 630.

2122. Co-representatives are joint and several owners of such of the property of the deceased as vests in them;^(a) and, subject to Tit. VII, § 2202, *post*, any one of them can perform the functions of a sole representative in respect thereof.^(b)

- (a) *Owen v. Owen* (1738) 1 Atk., at p. 495.
- (b) *Cole v. Miles* (1852) 10 Ha. 179 (alienation of assets).
Charlton v. Earl of Durham (1869) L. R. 4 Ch. App. 433 (giving receipts for debts due to the estate).

2123. The property of the deceased which vests in the personal representative vests in him in right of the deceased, and not in his own right;^(a) and the property thus vested in the representative is deemed to be separate from property which is vested in the representative in his own right.^(b)

- (a) *Pinchon's Case* (1612) 9 Rep., at fo. 88 b.
Farr v. Newman (1792) 4 T. R. 621.
- (b) *Farr v. Newman, ubi sup.*
Re Radcliffe [1892] 1 Ch. 227.

But:—

- (i) lapse of time, and enjoyment, with the consent of the beneficiaries, of the assets in a manner inconsistent with the trusts of the testament, may raise an inference that the assets have become the property of the representative in his own right; and

Re Morgan (1881) 18 Ch. D., at p. 100, *per* Fry, J.

- (ii) the creditors of the deceased may by their conduct preclude themselves from asserting, as against the creditors of the representative, that the property belongs to the representative in right of the deceased.

Ray v. Ray (1815) Cooper, 264.

Fox v. Fisher (1819) 3 B. & Ald. 135.

Kitchen v. Ibbetson (1873) L. R. 17 Eq. 46.

[For the powers of alienation vested in the representative, and the conditions of their exercise, see *post*, Tit. VII, § 2201.]

*Revocation
of grant*

2124. The Court will revoke a grant of probate or letters of administration if the grant has been obtained by false or fraudulent allegations,^(a) or if a later testament is found,^(b) or if the personal representative becomes incapable of acting,^(c) or disappears.^(d)

(a) *Harrison v. Weldon* (1731) 2 Stra. 911.

Goods of Bergman (1842) 2 Notes of Cases, 22.

Goods of Birch [1902] P. 130.

(b) *Woolley v. Clark* (1822) 5 B. & Ald. 744.

(c) *Offley v. Best* (1668) 1 Sid., at pp. 372-3.

(d) *Goods of Covell* (1889) 15 P. D. 8.

Goods of Loveday [1900] P. 154.

[For a detailed account of the various other grounds on which the Court will revoke a grant, see Williams, *Executors* (10th edn.), pp. 449-459. Presumably, when a grant has been revoked, and there is no executor entitled, a grant *de bonis non administratis* (ante, Tit. I, § 2109) is made to a new administrator (*Garner v. Dee* (1671) 1 Freem. K. B. 13; *Warren v. Kelson* (1858) 1 Sw. & Tr. 290).]

2125. Notwithstanding the revocation of a grant of probate or administration :

*Validity
of acts be-
fore revo-
cation*

- (i) acts previously done by the representative in due course of administration of the estate are not thereby rendered invalid ;

Boxall v. Boxall (1884) 27 Ch. D. 220.
Hewson v. Shelley [1914] 2 Ch. 13.

- (ii) payments previously made to the representative under such grant in good faith discharge the payers ;

Court of Probate Act, 1857, s. 77.

- (iii) the representative is entitled to be reimbursed payments made by him in a due course of administration ;

Ibid.

- (iv) persons who have made any payment or transfer to him upon the faith of such probate or administration will not be thereby prejudiced.

Ibid., s. 78.

TITLE III—RIGHTS AND LIABILITIES PASSING TO THE PERSONAL REPRESENTATIVE

*Property
passing to
represent-
ative*

2126. All the property of a deceased person (but not property over which he has a general power of appointment which he has exercised by his testament^(a)), other than property held by him as a joint owner (*ante*, Bk. III, Sect. XVI, Tit. II, § 1753), or as a tenant in tail or quasi tail,^(b) whether or not it is disposed of by his testament, vests at his decease in his personal representative;^(c) except that the legal estate^(d) in land of copyhold or customary freehold tenure, in any case in which an admission or any act of the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant, does not so pass, but vests in the customary heir.^(e)

(a) *O'Grady v. Wilmot* [1916] 2 A. C. 231.

(b) Estates tail would appear to be within the literal wording of s. 1 of the Land Transfer Act, 1897; but, having regard to the fact that they are not assets for payment of the deceased tenant's debts, would seem not to be within its purpose.

(c) Conveyancing Act, 1881, s. 30 (trust and mortgage estates).
Land Transfer Act, 1897, s. 1 (1).

(d) *Ibid.*, s. 1 (4).
Somerville's & Turner's C. [1903] 2 Ch. 585.

(e) Copyhold Act, 1894, s. 88.
Land Transfer Act, 1897, s. 1 (4).

[The estate *pur autre vie* limited to a special occupant is not expressly mentioned in the Land Transfer Act, 1897, s. 1; but,

regard being had to the fact that it is by the Wills Act, 1837, s. 6, expressly made assets for payment of the deceased tenant's debts, it would appear to fall within the scope of the former statute, and to pass to the personal representative accordingly. Where there is no special occupant, the estate *pur autre vie* goes to the personal representative under s. 6 of the Wills Act, 1837.]

2127. Subject to any agreement between the partners, the amount due from surviving partners to the personal representatives of a deceased partner in respect of the deceased partner's share in the partnership property, is a debt accruing at the date of his death; ^(a) and the representative of the deceased partner has a general lien upon the surplus assets of the partnership for the amount due.^(b)

*Claim to
share of
partnership
property*

(a) Partnership Act, 1890, s. 43.

(b) *Re Bourne* [1906] 2 Ch., at p. 432, *per* Romer, L. J.

[Such a lien is, as the Court pointed out, only in the nature of an equitable charge, which does not prevent dealing with the assets by the surviving partners, at any rate in favour of *bonâ fide* purchasers, but merely entitles the lienor to a sale by the Court. It bears little, if any, resemblance to a common law lien on goods (*ante*, Bk. III, Sect. X, Tit. II, §§ 1591-1603).]

2128. Subject to §§ 2129-2140, *post*, the question whether property of the deceased passing to the personal representative or the customary heir is real or personal estate, is determined by the actual condition of the property at the time of the decease.

*Nature of
property
passing*

Re Grange [1907] 1 Ch., at p. 315, *per* Parker, J.

*Equities of
redemption
and mort-
gages*

2129. If real estate belonging to the deceased is subject to a mortgage at the time of his decease, the equity of redemption passes as real estate to his personal representative or customary heir, as the case may be.^(a) The interest of a deceased mortgagee of real estate passes to his personal representative or customary heir as personalty; even though the mortgagor's equity of redemption is afterwards barred by lapse of time.^(b) But if, after the mortgagee's death, the title of the mortgagor becomes barred by lapse of time, the property then becomes real estate for the purposes of devolution.^(c)

(a) *Fawcett v. Lowther* (1751) 2 Ves. Sen. 300.

(b) *A.-G. - v. Vigor* (1803) 8 Ves., at p. 277.
Re Loveridge [1902] 2 Ch. 859.

[*A fortiori*, the interest of a mortgagee of personal estate passes to his representative as personalty.]

(c) *Re Loveridge* [1904] 1 Ch. 518.

*Options to
purchase*

2130. If a lessee for years has an option to purchase the reversion on the term, and the option is exercised after his death by his personal representative, the reversion (even though it is, for other purposes, real estate) passes as part of the personal estate of the lessee.

Re Adams and Kensington Vestry (1884) 27 Ch. D. 394.

*Arrears
of rents*

2131. Rent incident to a freehold reversion, or a rent charge (*ante*, Bk. III, Tit. IX, §§ 1280-1294)

held for a freehold interest, arising in respect of the period after the death of the owner of such reversion or rent charge, passes to his personal representative as real estate; but arrears of such rent which have accrued in the life-time of the reversioner or rent-charger pass to his representative as personal estate.

Apportionment Act, 1870, s. 4.

Godolphin, *Orphan's Legacy* (2nd edn.), Pt. II, c. 13, § 3.

[Annuities generally pass as personalty, unless granted with words of inheritance (*Stafford v. Buckley* (1750) 2 Ves. Sen. 169; *Parsons v. Parsons* (1869) L. R. 8 Eq. 260).]

2132. In the absence of agreement to the contrary between the partners, real estate which passes to the personal representative of a deceased partner as part of his share in the partnership assets, passes as personal estate. *Partnership real estate*

A.-G. v. Hubbuck (1884) 13 Q. B. D., at pp. 289, 290, *per* Bowen, L. J.

[Partners are usually made joint tenants of real estate acquired for partnership purposes; and, on the death of one of them, his legal interest passes, therefore, to the survivors and not to his representative (*ante*, Bk. III, Sect. XVI, Tit. II, § 1754).]

2133. Heirlooms (*ante*, Bk. III, Sect. IX, Tit. II, § 1550), though chattels, pass with the land to which they are annexed as real estate; ^(a) but fixtures ^(b) and emblements, ^(c) in so far as they are legally severable *Heirlooms and fixtures*

from the land to which they are attached, pass to the personal representative of the owner of the land as personal estate.

(a) *Hill v. Hill* [1897] 1 Q. B. 483.

[The same rule applies to fish in a pond, deer in a park, conies in a warren, and doves in a dove house (Co. Litt. 8 a).]

(b) *Leigh v. Taylor* [1902] A. C. 157.

Re Hulse [1905] 1 Ch., at p. 410.

Re Whaley [1908] 1 Ch. 615.

(c) *Lawton v. Lawton* (1743) 3 Atk., at p. 16.

Cooper v. Woolfitt (1857) 2 H. & N. 122.

[Generally speaking, however, as between the successors (whether by intestacy or testamentary disposition) of a deceased owner in fee simple, there is no presumption that the claimants of the personalty are entitled to sever fixtures or emblements (*Re Roose* (1880) 17 Ch. D. 696; *Re Hulse, ubi sup.*, at p. 410; *Re Whaley, ubi sup.*, at p. 620). But such presumption may be raised by the provisions of a will. Of course where the deceased is not owner of the land, fixtures and emblements which he or his representative was or is entitled to sever pass, *à fortiori*, as personal estate.]

Conversion

2134. When, either by a testament or transaction *inter vivos*, real estate is directed or contracted, either by its beneficial owner, or by its fiduciary owner lawfully acting under any power vested in him, to be sold or otherwise exchanged for personal estate, or when by Act of Parliament or the order of a Court of competent jurisdiction a similar direction is given, such real estate will, from the time at which such direction or contract becomes binding, be regarded in equity as personal estate, and will, subject to §§ 2135, 2136, and 2138–2140, *post*, be treated as such in the distribution of the assets of its owner; whether or not

the direction or contract has actually been carried out. The converse of this rule applies to personal estate directed or contracted to be invested in the acquisition of real estate.

Fletcher v. Ashburner (1779) 1 Bro. C. C., at p. 499, *per* Sir Thomas Sewell, M. R.

A.-G. v. Brunning (1860) 8 H. L. C. 243.

Re Cleveland's Settled Estates [1893] 3 Ch. 244.

Re O'Grady [1915] 1 Ch. 613.

[The doctrine of Conversion is not confined to administration of assets (*Re Gosselin* [1906] 1 Ch. 120); but by far the greater number of cases affected by it fall under that head, because for most other purposes it is immaterial whether a fund is treated as real or personal estate. It should be realized, however, that administration purposes include not merely distribution among heirs and next of kin, but also incidence of Death Duties (*A.-G. v. Brunning, ubi sup.*; *Re O'Grady, ubi sup.*), marital claims (*Sweetapple v. Bindon* (1705) 2 Vern. 536), and order of resort for payment of debts and legacies (*post*, Titt. V and VI). But it should also be observed that, while Equity regards land directed to be sold as personalty, and conversely, a fund directed to be invested in the purchase of land in a particular place will not be regarded as real estate in that place, until the investment has been actually made (*Re Cleveland's Settled Estates, ubi sup.*; *Re Upton Cottrell Dormer* (1915) 84 L. J. (Ch.) 861). Moreover, a mere power to sell or invest will not operate as a conversion until the power is lawfully exercised (*Re Dyson* [1910] 1 Ch. 750); though, on the other hand, if there is a clear direction to sell or invest, a power to postpone sale or investment will not prevent the application of the doctrine (*Re Bird* [1892] 1 Ch. 279). A trust or direction for sale which is not binding because the trustees are the only persons interested, will not work a conversion (*Re Newbould* (1914) 110 L. T. 6); and a similar rule holds if the direction or trust is only exercisable on the request, or with the consent, of a person who has not in fact requested or consented (*Re Goswell's Trusts* [1915] 2 Ch. 106; *Re Rogers* [1915] 2 Ch. 437).]

2135. When such a direction as is described in § 2134 is contained in a testament, and the purposes *Failure of testamentary direction*

for which it is expressed to be made have been fulfilled or have failed, wholly or partially, leaving a surplus of the fund undisposed of, such undisposed of surplus will be treated, in the administration of the testator's assets, as if such direction had never been given with regard to it.^(a) For the purposes of this §, a residuary devise or bequest is not regarded as a disposition;^(b) unless there is an expression of intention to that effect in the testament.^(c)

(a) *Ackroyd v. Smithson* (1780) 1 Bro. C. C. 503.

Cogan v. Stephens (1835) 5 L. J. Ch. 17.

Bective v. Hodgson (1864) 10 H. L. C., at p. 667, *per* Lord Westbury, C.

(b) *Amphlett v. Parke* (1831) 2 Russ. & M. 221.

(c) *Court v. Buckland* (1876) 1 Ch. D. 605.

*Total and
partial
failure*

2136. When a person succeeds to property by reason of the failure of the purposes of the testator, under the rule set out in § 2135, then, if such failure was total, the property will, for purposes of the distribution of the assets of such successor, be regarded (subject to § 2140) as of the character which it bore at the testator's death, whether or not the direction has in fact been carried out.^(a) If such failure was partial only, the property will, for similar purposes, be regarded as of the character which it would have assumed if the direction of the testator had been carried out; whether or not such direction has in fact been carried out.^(b)

(a) *Smith v. Claxton* (1819) 4 Madd. 484.

(b) *Curteis v. Wormald* (1878) 10 Ch. D. 172.

Re Richerson [1892] 1 Ch. 379.

[Certain expressions of the Court in the case of *Curteis v. Wormald* (1878) 10 Ch. D. 172, though explained by Chitty, J., in *Re Richerson*, *ubi sup.*, seem to be somewhat inconsistent with the latter decision. But *Re Richerson* is usually regarded as settling the law.]

2137. When such a direction as is described in § 2134 is contained in a transaction *inter vivos*, then, subject to § 2140 (*post*), even though the direction is not to take effect till the death of the settlor, the fund will, as from the date of the transaction, be regarded for all purposes of succession as though such direction had been in fact carried out; ^(a) unless (*semble*) at the time when the direction became operative, there was no person in existence (or capable of coming into existence) entitled to enforce it. ^(b)

*Failure of
direction
inter vivos*

- (a) *Hewitt v. Wright* (1780) 1 Bro. C. C. 86.
Griffith v. Ricketts (1849) 7 Ha., at pp. 311-2, *per* Wigram, V. C.
Clarke v. Franklin (1858) 4 K. & J., at p. 264, *per* Wood, V. C.
 (b) *Re Grimthorpe* [1908] 2 Ch. 675.

[Owing to the ambiguity of the expression 'failure of purposes,' there has been considerable doubt as to the true doctrine in the case of a settlement *inter vivos*; and, unfortunately, this doubt has not been removed by the expressions of Lord Cozens-Hardy, M. R., in the recent case of *Re Grimthorpe*, *ubi sup.*, at pp. 678-9, where his lordship, referring to the case of *Davenport v. Coltman* (1842) 12 Sim. 610, seems to take the view that, whether or not the direction in the settlement might have been operative, yet, if, in the events which happened, it could not have been enforced, there will be no conversion. The point was not necessary for the decision in *Re Grimthorpe*, which was covered by § 2140; but it may be pointed out that, in *Davenport v. Coltman*, (1) the settlement was by will, (2) the direction was nugatory from the time the settlement took effect, because the purposes of it failed in the testator's lifetime.]

*Sale under
Partition
Acts*

2138. Where there has been an order for sale of land and division of the proceeds under the Partition Act, 1868 (*ante*, Bk. IV, Sect. XVI, Tit. I, § 1749), a share in the land directed to be sold belonging to a person under disability is not deemed to be personal estate; even after the order has been carried into effect, and even though a request for sale has been made on behalf of the person under disability.

Foster v. Foster (1875) 1 Ch. D. 588 (infant).

Re Barker (1881) 17 Ch. D. 241 (lunatic).

Hopkinson v. Richardson [1913] 1 Ch. 284 (infant).

[The reason for this anomalous exception appears to be, that s. 8 of the Partition Act, 1868, incorporates s. 23 of the Settled Estates Act, 1856, which, though repealed for general purposes, is still in force as part of the Partition Act. There seems at one time to have been considerable doubt as to whether any alteration in the character of the estate of a lunatic could affect the rights of his successors (*A.-G. v. M. of Ailesbury* (1887) L. R. 12 App. Ca. 672). But it appears now to be the practice to apply the doctrine of conversion to lunatics' estates; unless the order sanctioning the transaction expressly excludes it (*Re Gist* [1904] 1 Ch. 398; *Re Grange* [1907] 2 Ch. 20; *Re Searle* [1912] 2 Ch. 365). And with regard to infants and married women, the modern authorities appear to make it quite clear that, with the exception of the case in the text, an absolute order for sale by a duly qualified Court, even though made for a particular purpose only, works a conversion for all purposes (*Steed v. Preece* (1874) L. R. 18 Eq. 192; *Burgess v. Booth* [1908] 2 Ch. 648; *Fauntleroy v. Beebe* [1911] 2 Ch. 257).]

*Options to
purchase*

2139. When the owner of real estate has conferred upon another person a binding option to purchase such real estate, the property will, for the purposes of § 2134, be deemed to be personal estate as from the time when such person has bound himself to exercise

the option, but not before.^(a) Subject to § 2140, it makes no difference that the option is not exercised until after the death of the owner of the real estate.^(b)

- (a) *Lawes v. Bennett* (1785) 1 Cox, 167.
Ex parte Hardy (1861) 30 Beav. 206.
Re Isaacs [1894] 3 Ch. 506.

[Consequently, there can be no claim to back rents by the taker of the personal estate (*Townley v. Bedwell* (1808) 14 Ves. 591).]

- (b) *Re Pyle* [1895] 1 Ch. 724.

[Presumably, the converse rule would apply in the conceivable but unlikely case of the owner of personalty creating an option to exchange it for real estate.]

2140. The rules stated in §§ 2134–2137 and 2139, *ante*, are subject to any expression of intention either by the settlor^(a) or by any person who becomes absolutely entitled to the property in question under the provisions of the settlement.^(b)

- (a) *Phillips v. Phillips* (1832) 1 My. & K. 649.
Fitch v. Weber (1848) 6 Ha. 145.
Re Pyle [1895] 1 Ch. 724.
 (b) *Re Glassington* [1906] 2 Ch. 305.
Re Grimthorpe [1908] 2 Ch. 675.
O'Grady v. Wilmot [1916] 2 A. C. 31.

[The latter process is sometimes spoken of as 'Reconversion'; but the term is ambiguous and not very useful. With regard to sales of real estate effected under statutory powers, it is not uncommon for the Acts to provide that the moneys realized shall be treated as real estate until they come into the hands of an absolute owner. Conspicuous examples are: s. 69 of the Lands Clauses Consolidation Act, 1845 (*Re Harrop's Estate* (1857) 3 Drew. 726; *Kelland v. Fulford* (1877) 6 Ch. D. 491); s. 34 of the Settled Estates Act, 1877; s. 22 (5) of the Settled Land Act, 1882; and s. 2 of the Land Transfer Act, 1897. On the other hand, a compulsory sale by a person *sui juris* under the Lands Clauses Consolidation Act,

even if the money is paid into Court under s. 76 of that Act, works a conversion for all purposes from the time that the price is fixed (*Manchester and Southport Railway Co.* (1854) 19 Beav. 365; *Re Harrop's Estate*, *ubi sup.*). The rule would appear to be different in the case of a compulsory sale on behalf of a person under disability (*Re Tugwell* (1884) 27 Ch. D. 309).]

*Survival
of choses
in action*

2141. In so far as rights arising out of contract and tort survive the contracting or injured party, they pass to, and can be enforced by, his personal representative.

13 Edw. I, st. I (1285), c. 23.

4 Edw. III (1330), c. 7.

25 Edw. III st. V (1351), c. 5.

[For particulars, see *ante*, §§ 251 (contract) and 787 (tort).]

*Benefit of
covenants
running
with the
freehold*

2142. The benefit of a covenant which runs with a freehold estate of inheritance (*ante*, Bk. III, Sect. III, Tit. II) passes to the personal representative as real estate till assent or conveyance to the heir or devisee.^(a) Upon such assent or conveyance it passes to the heir or devisee,^(b) even if the covenant has been broken in the life-time of the deceased, provided that substantial damage has ensued since the death.^(c) If the deceased has been evicted in his lifetime, or suffered other substantial damage in respect of the land, the right to damages passes to the representative as personal estate.^(d)

(a) Land Transfer Act, 1897, s. 1 (1).

Kingdon v. Nottle (1813) 1 M. & S. 355.

King v. Jones (1814) 5 Taunt. 418.

[In the case of a legal estate in land of copyhold tenure, the right to sue would doubtless pass direct to the heir or devisee.]

- (b) Land Transfer Act, 1897, s. 3 (1).
Lougher v. Williams (1673) 2 Lev. 92 }
Sale v. Kitchingham (1713) 10 Mod. 158 } (heir).
Roe d. Bamford v. Hayley (1810) 12 East, 464 }
Vyvyan v. Arthur (1823) 1 B. & C. 410 } (devisee).
- (c) *King v. Jones*, *ubi sup.*
- (d) *Lucy v. Levington* (1671) 2 Lev. 26.
Kingdon v. Nottle, *ubi sup.*, at pp. 363-4, *per* Lord Ellenborough, C. J.

2143. If a representative, as such, enters into contracts,^(a) or if torts are committed against the property of the deceased, after the latter's death,^(b) and the benefit of such contracts, or the damages recoverable for such torts, would, when recovered, be assets of the deceased, the representative may sue upon such contracts or torts either in his representative or in his personal capacity, as he may think best.

Representative may sue in either capacity

- (a) *Moseley v. Rendell* (1871) L. R. 6 Q. B. 338.
Abbott v. Parfitt (1871) *ibid.* 346.
- (b) *Adams v. Cheverel* (1606) Cro. Jac. 113.
Hollis v. Smith (1808) 10 East, 293.

[The same principle applies to the recovery of assets of the deceased paid away by mistake (*Clark v. Hougham* (1823) 2 B. & C. 149).]

2144. In so far as liabilities in contract and tort survive the contractor or tort-feasor, they pass to and can be enforced against his personal representative.^(a) In respect of covenants the burden of which runs with the land at law, the heir or devisee is also liable

Survival of liabilities

to the extent of assets received by him; ^(b) and in respect of covenants whereof the burden runs in equity, such persons are liable in manner and to the extent specified in Bk. III, Sect. III, Tit. II, § 1379, *ante*.

- (a) 13 Edw. I, st. I (1285), c. 19.
Bk. II, Pt. I, Sect. III, Tit. I, §§ 249, 250, *ante*.
Bk. II, Pt. III, Sect. I, Tit. VI, § 787, *ante*.
- (b) *Derisley v. Custance* (1790) 4 T. R. 75 (heir).
Debts Recovery Act, 1830, ss. 2, 3 (devisees).

[As a rule, liabilities in contract do survive; but there are exceptions (*ante*, Bk. II, Pt. I, Sect. III, Tit. I, § 249). As a rule, liabilities in tort do not survive; but the exceptions cover a wide ground (*ante*, Bk. II, Pt. III, Sect. I, Tit. VI, § 787, *ante*).]

*Liabilities
of lessor's
representative*

2145. The personal representative of a lessor is liable to the lessee, to the extent of assets, for all breaches of covenants in the lease committed by the lessor in his lifetime, including covenants which run with the reversion.^(a) But if the lessor's real estate has been devised, liability for the breach of the obligations of the lessor incident to the relation of landlord and tenant falls, as amongst the persons entitled to his estate, primarily upon the devisee; ^(b) and (*semble*) the same rule applies in the case of real estate passing to the lessor's heir on intestacy.

- (a). *Eccles v. Mills* [1898] A. C., at p. 371.
- (b) *Mansel v. Norton* (1883) 22 Ch. D. 769.
Eccles v. Mills, *ubi sup.*, at pp. 371-2.

[Strange as it may appear, there seems to be little or no authority on the important question whether the liability for breaches of covenants running with the inheritance (not being a reversion) occurring

after the covenantor's death, falls upon the general personal estate or upon the persons taking the inheritance. On principle it should fall on the latter (see F. N. B. 145 E, note (a)).]

2146. The personal representative of a lessee, *Liability of lessee's representative* whether or not such representative has entered upon the land demised, is liable to the lessor, to the extent of the assets of the deceased, for breaches of the stipulations contained in the lease, occurring either before or after the lessee's death ; and, subject to § 2148 *post*, he remains liable, although the premises have been assigned by the lessee^(a) or by himself.^(b) But the personal representative of an assignee of a lease does not remain liable for breaches occurring after a *bonâ fide* assignment by the deceased or himself;^(c) and if the stipulations in the lease are onerous, it may be his duty to assign it.^(d)

(a) *Brett v. Cumberland* (1617) Cro. Jac. 521.

(b) *Coghill v. Freelove* (1691) 3 Mod. 325.

(c) *Pitcher v. Tovey* (1692) 4 Mod. 71.

(d) *Onslow v. Corrie* (1817) 2 Madd. 330.

[These rules are merely the consequences of the general principles as to liability on leases set out in Bk. III, Sect. I, Tit. VI, §§ 1146, 1148, *ante*.]

2147. The personal representative of a lessee, if he *Personal liability of representative entering on land* has entered on the land demised, becomes liable personally to the lessor, irrespective of assets, for the future rent and upon future breaches of the stipulations in the lease, until he assigns the lease.^(a) If the

estate is insolvent, his liability in respect of rent is limited to the yearly value of the premises;^(b) but his liability for the breach of a covenant to repair is unlimited.^(c)

- (a) *Wollaston v. Hakewill* (1841) 3 Man. & Gr., at p. 320, per Tindal, C. J.

[It is for this reason that the personal representative can, before distributing the assets, claim to have a sum of money set apart to indemnify him against future liabilities which he may personally have incurred by taking possession, as an assign of the lessor (*Re Nixon* [1904] 1 Ch. 638). The representative of an assignee naturally gets rid of all liability for future breaches by assigning the lease (§ 2146, ante).]

- (b) *Re Bowes* (1887) 37 Ch. D. 128.

Whitehead v. Palmer [1908] 1 K. B. 151.

- (c) *Tremeere v. Morison* (1834) 1 Bing. N. C. 89.

Rendall v. Andreae (1892) 61 L. J. (Q. B.) 630. (There appears to be no authority as to covenants other than covenants to repair.)

Statutory
notices

2148. If a representative, liable as such for the rents or covenants in a lease, or for rent, covenants, or agreements contained in any conveyance on chief rent or rent charge, granted or assigned to the deceased, has satisfied all liabilities in these respects, and has set apart a sum sufficient to answer future liabilities in respect of any fixed sum agreed by the lessee or grantee to be laid out upon the property demised or conveyed, though the period for laying out the same has not arrived, and if he has assigned the lease or conveyed the property, he may distribute the residuary estate, and will then be under no further liability in respect of the lease or conveyance. But

the lessor or grantor may, in case further liabilities arise, follow the assets into the hands of those to whom they have been distributed.

Law of Property Amendment Act, 1859, ss. 27, 28.

[The right of the creditor to follow the assets after distribution is, however, purely equitable, and can only be exercised on equitable principles. Thus, if the creditor has induced the beneficiaries to believe that they might safely take the assets, his remedy against them will be gone (*Blake v. Gale* (1886) 32 Ch. D. 571); and, if he might have proved in the ordinary way before distribution, he will only be allowed to enforce his claim *pro ratâ* (*Gillespie v. Alexander* (1826) 3 Russ. 130). But, if he was unable to prove, he may sue any beneficiary, and leave adjustment to him (*Davies v. Nicolson* (1858) 2 De G. & J. 693); and mere delay, if satisfactorily explained, is no bar to his action (*Re Eustace* [1912] 1 Ch. 561).]

2149. The personal representative of a deceased shareholder is liable, to the extent of assets, to satisfy all obligations connected with the holding.^(a) If the shares are transferred into his name on the register of shareholders of the company, he becomes a member of the company, and can be made personally liable, irrespective of assets, for calls subsequently becoming due thereon.^(b) The personal representative can transfer the shares of the deceased without being registered as a shareholder.^(c)

*Liability
of repre-
sentative
on shares*

(a) *Baird's Case* (1870) L. R. 5 Ch. App., at p. 735.

(b) *Buchan's Case* (1879) L. R. 4 App. Ca. 549.

(c) Companies (Consolidation) Act, 1908, s. 29.

2150. The personal representative of a deceased partner is liable, to the extent of the deceased's assets,

*Liability
of repre-*

*sentative
for partner-
ship debts*

after the deceased's separate debts have been paid, for the debts of the firm contracted while the deceased was a partner.

Partnership Act, 1890, s. 9.

Re Hodgson (1885) 31 Ch. D. 177.

[A limited partner's estate cannot be made liable for more than the capital contributed by him (Limited Partnership Act, 1907, s. 4 (2)).]

*New liabil-
ities in-
curred by
represent-
ative*

2151. If a personal representative incurs new liabilities in the execution of his office, he is personally liable to the creditors thereon, irrespective of assets. But if such liabilities were incurred by him in due course of administration, he may be sued in his representative capacity.

Asbby v. Asbby (1827) 7 B. & C. 444.

[For the representative's right of indemnity, see *post*, Tit. VIII, § 2213.]

TITLE IV — ASSETS

2152. Assets comprise all property passing on the death of a person to his personal representative, or to his heir, devisee, or special occupant (*ante*, Bk. III, Sect. I, Tit. IV, § 1082) which is in their hands liable for payment of the deceased's debts and legacies, or debts or legacies, or the claims of the next of kin of the deceased, in manner hereinafter described. *Definition*

[Property which does not pass to the personal representative or heir on the death, e. g. property subject to a general power of appointment, *donationes mortis causâ*, and paraphernalia, may also be assets. As to these, see *ante*, Bk. III, Sect. VI, Tit. I, § 1464, and *post*, Tit. VI, § 2183 (X) and n.]

2153. The liability of the personal representative, as such, to pay the debts or legacies of the deceased is *primâ facie* limited to the amount of the assets which he has received or which but for his wilful default (*post*, Tit. VIII, § 2220 (ii)) he might have received.^(a) And a plea that he has fully administered the assets is (subject to Tit. III, §§ 2147 and 2149, *ante*), if proved, a defence to any claim by a creditor or a legatee.^(b) The liability of the heir, devisee, or special occupant is similarly limited.^(c) *Limitation of liability of representatives*

(a) Bl. *Comm.* II, 510.

(b) *Erving v. Peters* (1790) 3 T. R., at p. 688, *per* Lord Kenyon, C. J.

(c) Debts Recovery Act, 1830, ss. 6, 8.

Administration of Estates Act, 1833.

Wills Act, 1837, s. 6.

All property of deceased now assets

2154. All the property of a deceased person, whether real^(a) or personal,^(b) (other than estates tail (*ante*, Bk. III, Sect. I, Tit. III)), and property held by him in trust for other persons (*ante*, Bk. III, Sect. XVII) which passés to his personal representative, or to his heir, devisee, or special occupant, is assets, legal or equitable, for the payment of all his debts.

(a) Debts Recovery Act, 1830, ss. 3, 4, 6-8.

Administration of Estates Act, 1833.

Wills Act, 1837, s. 6.

Land Transfer Act, 1897, s. 2 (3).

(b) Sheppard, *Touchstone* (4th ed.) 455.

Bl. *Comm.* II, pp. 510-11.

[A fund over which the deceased had a general power of appointment is assets if the power is duly exercised, directly or indirectly, by the deceased's will (see *ante*, Bk. III, Sect. VI, Tit. I, § 1465), but not otherwise (*Holmes v. Coghill* (1802) 7 Ves. 499).]

Legal personal assets

2155. All the property of a deceased person which, before the passing of the Land Transfer Act, 1897, vested in the personal representative *virtute officii*, is legal personal assets for the payment of the deceased's debts;^(a) and his creditors can assert their claims in respect thereof either by a personal action against the representative,^(b) or by an action for the administration of the estate.^(c)

(a) *Cook v. Gregson* (1856) 3 Drew. 547.

Shee v. French (1857) *ibid.* 716.

A.-G. v. Brunning (1860) 8 H. L. C., at pp. 258-9, *per* Lord Cranworth.

(b) *Cook v. Gregson*, *ubi sup.*

(c) Chancery Procedure Act, 1852, s. 45.

[This property includes, in addition to chattels corporeal, and choses in action (*Shee v. French* (1857) 3 Drew. 716), equities of

redemption of chattel interests (*Cook v. Gregson, ubi sup.*) and, *à fortiori*, equitable personal estate generally, estates *pur autre vie* (Wills Act, 1837, s. 6), but not personalty subject to a general power of appointment exercised by the deceased's will (*O'Grady v. Wilmot* [1916] 2 A. C. 31.)]

2156. Real estate which, under the Land Transfer Act, 1897, passes to the personal representative, is (probably) when it passes from the personal representative to the heir, devisee, or special occupant, legal real assets in their hands for the payment of specialty debts.^(a) The specialty creditors of the deceased can assert their claims in respect of such assets by action against the heir,^(b) devisee,^(c) or special occupant, respectively;^(d) and, if he has wholly or partially aliened or charged such assets before judgment in the creditors' action, the heir, devisee, or special occupant will remain liable to the extent of the assets so aliened or charged. But the creditors cannot enforce their rights against the estate in the hands of a *bonâ fide* alienee or incumbrancer.^(e)

*Legal real
assets*

(a) Land Transfer Act, 1897, ss. 2 (3), 3 (1).

[Copyholds were never legal real assets, either at common law (*Brown's Case* (1581) 4 Rep. 22 a) or under the Statute of Fraudulent Devises, which merely enacted that creditors should not be deprived of their rights by a devise.]

(b) Statute of Frauds (1677) s. 10 (3).

Conveyancing Act, 1881, s. 59.

Co. Litt. 376 b.

Bl. Comm. II, 244.

(c) Debts Recovery Act, 1830, s. 4.

[This includes devisees of life interests, and of equitable interests (*Re Atkinson* [1908] 2 Ch., at p. 314, *per* Cozens-Hardy, M. R.).]

- (d) Wills Act, 1837, s. 6.
- (e) Debts Recovery Act, 1830, ss. 6, 8.
British Mutual Investment Co. v. Smart (1875) L. R. 10 Ch. App. 567.
Cary's & Lott's Contract [1901] 2 Ch. 463.
Re Atkinson, ubi sup.

[The rule as to the effect of alienation or charge by the heir or devisee is the same in respect of real estate made equitable assets by the Administration of Estates Act, 1833.]

*Priority
of debts
against
legal assets*

2157. In the administration of legal assets, the debts of the deceased must be paid in the order specified in Tit. V, § 2161, *post*; ^(a) and the personal representative, other than a creditor administrator, ^(b) has the rights of preference and retainer specified in Tit. V, §§ 2165–2172, *post*. The heir or devisee has a similar right of retainer (? preference) in respect of specialty debts out of the legal real assets when they have come into his possession; ^(c) unless the land is charged by the testator with the payment of his debts. ^(d)

- (a) *Turner v. Cox* (1853) 8 Moo. P. C., at pp. 305–6.
- (b) This exception is the result of the present form of the creditor administrator's bond (Practice Note, W. N. [1899] 262–3). For the older practice, see *Davies v. Parry* [1899] 1 Ch. 602; *Re Belham* [1901] 2 Ch. 52.
- (c) *Re Illidge* (1884) 27 Ch. D., at pp. 482–3.

[Obviously this right cannot be exercised by the heir or devisee, so long as the land is in the hands of the personal representative; but there is nothing in the Land Transfer Act, 1897, to take it away from the heir or devisee after the land has passed to him. Is the right now extended to simple contract debts by *Re Samson* [1906] 2 Ch. 584 ?]

- (d) *Re Illidge* (1883) 24 Ch. D., at p. 660, *per* Chitty, J.

2158. Such of the assets of a deceased person as vest in his personal representative by virtue of the Land Transfer Act, 1897 (*ante*, Tit. III, § 2126) are (probably) equitable assets in the hands of such representative for the payment of the deceased's debts;^(a) but the creditors of the deceased can (probably) assert their claims in respect of them either by an action for the administration of the estate, or, until such property has passed to the heir or devisee, by a personal action against the representative.^(b) Assets which do not vest in the personal representative under the Land Transfer Act, 1897, or *virtute officii*, are equitable assets for payment of the deceased's debts;^(c) and the creditors of the deceased can only assert their claim in respect of them by an action for the administration of the estate.^(d)

(a) Land Transfer Act, 1897, s. 2 (3). (This would seem to be the result of the proviso to this sub-section.)

Re Williams [1904] 1 Ch. 52.

(b) Land Transfer Act, 1897, s. 2 (3).

(c) Administration of Estates Act, 1833.

(d) *Ibid.*

[The doubt which long existed as to the position of a fund over which the deceased has exercised a general power of appointment by his will has now been substantially resolved by the decision of the House of Lords in *O'Grady v. Wilmot* [1916] 2 A. C. 31.]

2159. In the administration of equitable assets, (*semble*) Crown debts and debts to which priority has been given by statute (*post*, Tit. V, §§ 2162, 2163) must be paid first; and debts incurred without valuable consideration are, unless they have been assigned

*Order of
debts
against
equitable
assets*

for value, postponed to debts incurred for value.^(a) In other respects the debts of the deceased are payable *pari passu* out of equitable assets; and the personal representative has no right of retainer or (*semble*) preference in respect of such assets.^(b)

(a) *Payne v. Mortimer* (1859) 4 De G. & J. 447.

(b) *Bain v. Sadler* (1871) L. R. 12 Eq. 570.

Re Baker (1890) 44 Ch. D., at p. 270, *per* Cotton, L. J.

[Moreover, if creditors who have resorted to legal assets afterwards claim to be paid out of equitable assets, their claims will only be admitted on terms of bringing into account the sums received by them out of the legal assets (*Sheppard v. Kent* (1702) 2 Vern. 435; *Deg v. Deg* (1727) 2 P. Wms. 412; *Haslewood v. Pope* (1734) 3 P. Wms. 322).]

*Legatees
no claim on
real estate*

2160. In the absence of provision to the contrary contained in the testament (*post*, (Tit. VI, §§ 2191-2192)), and subject to Tit. VI, § 2193, *post*, only the personal estate of the deceased is assets for the payment of legacies.

Robertson v. Broadbent (1883) L. R. 8 App. Ca., at p. 815, *per* Lord Selborne, C.

TITLE V — THE ORDER IN WHICH DEBTS ARE PAYABLE

2161. Subject to §§ 2162 and 2163, *post*, debts due from the deceased at his death are, *primâ facie*, payable out of his legal assets (*ante*, Tit. IV, §§ 2155, 2156) in the following order; that is to say, so long as any of the debts described in an earlier subparagraph remain unpaid, there can be no claim against such assets in respect of any debts described in a later: —

*Order
against
legal assets*

- (i) debts due upon judgments recovered against the deceased in any Court of Record,^(a) or upon orders made against him by a Court of Equity.^(b) (*Semble*) the judgment creditor who first sues out execution is preferred;^(c) but otherwise such debts are payable *pari passu*; ^(d)

- (a) *Littleton v. Hibbins* (1600) Cro. Eliz. 793.
Searle v. Lane (1688) 2 Vern. 88.

[A County Court is a Court of Record (County Courts Act, 1888, s. 5).]

- (b) *Searle v. Lane*, *ubi sup.*
Robinson v. Tonge (1735) 3 P. Wms., at p. 401 n. (This rule only applies to final orders; not to an order directing the taking of an account (*Smith v. Haskins* (1742) 2 Atk. 385).)

[The Law of Property Amendment Act, 1860, s. 3, deprived judgments of any preference unless they had been registered (see

Y Y

Van Gheluve v. Nerinckx (1882) 21 Ch. D. 189; but this statute was repealed by the Land Charges Act, 1900, s. 5. Therefore it would appear that there is now no need to register for this purpose; unless the Interpretation Act, 1889, s. 38 (2) (a) prevents the revival of the old law. *Quære*: would a representative who paid an ordinary debt in ignorance of an unregistered judgment be liable to the judgment creditor on a *devastavit*? For the rights of a surety who has satisfied a judgment recovered against the deceased debtor, see *Re M' Myn* (1886) 33 Ch. D. 575.]

(c) Wentworth, *Executors* (4th edn.) 195.

(d) *Dollond v. Johnson* (1854) 2 Sm. & G., at p. 304.

[A foreign judgment ranks for this purpose as a simple contract debt (*Grant v. Easton* (1883) 13 Q. B. D. 302).]

(ii) debts due upon recognizances;

Pemberton v. Barham (1590) 4 Rep. 59 b.

Bereblock v. Read, *ibid.*

Bl. *Comm.* II, 511.

[Recognizances are conditional acknowledgments on record of debts which become payable if the condition is broken (Bl. *Comm.* II, 341). Recognizances, other than recognizances to the Crown (*post*, § 2162), are now extremely rare.]

(iii) debts due upon judgments recovered against the personal representative in respect of debts due from the deceased,^(a) in order of date,^(b) provided that such judgments have been pronounced before an order has been made for the administration of the estate by the Court;^(c)

(a) *Re Williams' Estate* (1872) L. R. 15 Eq. 270.

(b) *Dollond v. Johnson* (1854) 2 Sm. & G. 301.

(c) *Paxton v. Douglas* (1803) 8 Ves. 520.

Re Stubbs' Estate (1878) 8 Ch. D. 154.

[The judgment gets no priority if it was obtained on the same day as the administration order (*Parker v. Ringham* (1864) 33 Beav. 535).]

(iv) specialty and simple contract debts, *pari passu*.

Administration of Estates Act, 1869.

Re Samson [1906] 2 Ch. 584.

[As previously stated (*ante*, Tit. IV, § 2159) all debts for valuable consideration, other than Crown debts and those to which preference is expressly given by statute, are payable *pari passu* out of equitable assets.]

2162. Except where the estate is being administered by the Court as an insolvent estate (*post*, § 2180),^(a) debts due to the Crown take priority of all other debts of the deceased^(b) (*semble*, as regards both legal and equitable assets).

(a) Judicature Act, 1875, s. 10.

Preferential Payments in Bankruptcy Act, 1888.

Bankruptcy Act, 1914, s. 151.

(b) Magna Carta (1225) 9 Hen. III, c. 18.

Littleton v. Hibbins (1600) Cro. Eliz. 793.

N. S. W. Taxation Commrs. v. Palmer [1907] A. C., at p. 182, *per* Lord Macnaghten.

[This appears to have been the rule for a long time as regards Crown debts of record and specialty. As regards Crown debts by simple contract, it is an inference from *Re Samson* [1906] 2 Ch. 584, and other similar cases, that the Administration of Estates Act, 1869, has placed specialty and simple contract debts on the same footing for all purposes of priority of payment out of the assets of a deceased debtor. (*Re Bentinck* [1897] 1 Ch. 673, must be regarded as overruled.) A surety to the Crown who has paid the debt of his deceased principal is entitled to the Crown's priority (*Re Churchill* (1888) 39 Ch. D. 174).]

2163. Debts to which priority has been given by statute are payable before all other debts except Crown

Statutory preference

debts (*semble*, out of both legal and equitable assets),
e. g.:—

Poor Relief Act, 1743, s. 3.
Friendly Societies Act, 1834, s. 12.
Trustee Savings Banks Act, 1863, s. 14.
Regimental Debts Act, 1893, s. 2.
Friendly Societies Act, 1896, s. 35.

[*Semble*, these debts rank *inter se* rateably; but the statutes are silent on the point.]

*Future
and con-
tingent
liabilities*

2164. The existence of future and contingent liabilities does not prevent creditors whose debts are presently due enforcing their claims.^(a) But, if such liabilities exist and become debts, the personal representative will render himself personally liable to pay them, if, knowing of their existence,^(b) he distributes the assets to the beneficiaries without satisfying them;^(c) unless he distributes them under an administration order of the Court.^(d)

(a) *Read v. Blunt* (1832) 5 Sim. 567.

Re Hargreaves (1890) 44 Ch. D. 236.

(b) *Re Fludyer* [1898] 2 Ch. 562.

(c) *Taylor v. Taylor* (1870) L. R. 10 Eq. 477. (As to his rights against the beneficiaries in such a case, see § 2182, *post*, and Tit. III, § 2148, n., *ante*.)

(d) *Re King* [1907] 1 Ch. 72.

[If the representative is unaware of the existence of such liabilities, he will be protected by notice issued under § 2182, *post*.]

*Preference
by repre-
sentative*

2165. A personal representative, other than a creditor administrator,^(a) can, as between creditors of equal degree,^(b) pay one in preference to another out

of the legal personal assets;^(c) even though he knows that the other has begun an action for the enforcement of his debt.^(d) But, after an order has been made for the administration of the estate by the Court,^(e) or the appointment of a receiver,^(f) this right cannot be exercised by the representative.

(a) Practice Note [1899] W. N. 262-3.

(b) Specialty and simple contract creditors are now regarded as of equal degree in this respect (*Re Orsmond* (1887) 58 L. T. 24; *Re Samson* [1906] 2 Ch. 584; *Re Harris* [1914] 2 Ch. 395).

(c) *Talbot v. Frere* (1878) 9 Ch. D., at pp. 570-1, *per* Jessel, M. R.

[Presumably the reasoning of *Re Williams* [1904] 1 Ch. 52, as to the right of retainer (*post*, § 2166), applies also to the right of preference.]

(d) *Vibart v. Coles* (1890) 24 Q. B. D. 364.

(e) *Davies v. Parry* [1899] 1 Ch., at p. 609. (The right is not lost by an order against the representative for an account (*Re Barrett* (1889) 43 Ch. D. 470).)

(f) *Re Radcliffe* (1878) 7 Ch. D., at p. 734.

2166. A personal representative, other than a creditor administrator,^(a) or an executor *de son tort*,^(b) can, as against creditors of equal degree,^(c) and as against creditors of a higher degree of whose claims he has no notice,^(d) retain, out of legal personal assets^(e) actually or constructively in his possession,^(f) a debt due to himself or his partnership firm^(g) from the deceased;^(h) whether the debt is due to him in his own right or as a trustee for another person.⁽ⁱ⁾

(a) Practice Note [1899] W. N. 262-3.

(b) *Coulter's Case* (1599) 5 Rep. 30 b.

Oxenham v. Clapp (1831) 2 B. & Ad., at pp. 313-5.

- (c) Specialty and simple contract creditors are now regarded as of equal degree in this respect (*Re Samson* [1906] 2 Ch. 584; *Re Harris* [1914] 2 Ch. 395).
- (d) *Re Fludyer* [1898] 2 Ch. 562. (The retainer must be made in good faith, and without undue haste (*ibid.*, at p. 565).)
- (e) *Walters v. Walters* (1881) 18 Ch. D. 182.
Re Baker (1890) 44 Ch. D., at p. 272.
Re Williams [1904] 1 Ch. 52.
- (f) *Pulman v. Meadows* [1901] 1 Ch. 233.
Re Beavan [1913] 2 Ch. 595.

[If the debt to the representative exceeds the amount of the assets, he can retain the assets in specie (*Re Gilbert* [1898] 1 Q. B. 282).]

- (g) *Re Jennes* (1909) 53 Sol. Jo. 376.
- (h) *Re Compton* (1885) 30 Ch. D., at p. 19, *per* Cotton, L. J.

[The debt must really be due to the representative himself, in his own or in another's right (*Wilson v. Wilson* [1911] 1 K. B. 327; *Re Duchess of Sutherland* [1914] 2 Ch. 720).]

- (i) *Davies v. Parry* [1899] 1 Ch., at p. 607. (But a representative of a deceased sole trustee, in whom the trust estate is vested, but who has not agreed to act as trustee, cannot be compelled to exercise this right in respect of debts owing to the trust estate (*Re Ridley* [1904] 2 Ch. 774; *Re Benett* [1906] 1 Ch. 216).

[*Seemle*, the heir or devisee in fee has a similar right of retainer in respect of his debt, out of any real estate vested in him (*Re Illidge* (1884) 27 Ch. D., at pp. 482-3 (heir); *Re Hayward* [1901] 1 Ch. 221 (devisee)); unless the real estate is charged with payment of debts. There would seem to be no ground for suggesting that this right has been abolished by the Land Transfer Act, 1897; but of course its importance has been greatly reduced by that statute.]

Retainer
not stopped
by admin-
istration
order

2167. The right of retainer can be exercised even after an order for the administration of the estate has been made,^(a) and out of (i) money paid into court, if the personal representative could have insisted upon the payment being made to himself,^(b) and (ii) money

paid by the personal representative to a receiver,^(c) or, if the estate is being administered in bankruptcy, to the official receiver.^(d) It cannot be exercised out of money collected by a receiver^(e) or the official receiver,^(f) or out of money collected by the personal representative after he knows that an application for an order to administer the estate in bankruptcy has been made.^(g)

- (a) *Re Belham* [1901] 2 Ch. 52.
Re Ambler [1905] 1 Ch. 697.
- (b) *Richmond v. White* (1879) 12 Ch. D. 361.
- (c) *Re Harrison* (1886) 32 Ch. D. 395.
- (d) *Re Rhoades* [1899] 2 Q. B. 347.
- (e) *Re Harrison*, *ubi sup.*
- (f) *Re Rhoades*, *ubi sup.*
- (g) *Ibid.*, at p. 352.

[The right of retainer takes precedence of the costs of an administration action (*Richmond v. White*, *ubi sup.*).]

2168. The right of retainer can be exercised in respect both of legal and of equitable debts,^(a) and also in respect of claims for unliquidated damages^(b) and other unascertained sums of money,^(c) provided that they are ascertainable by a fixed standard. No right of retainer can be asserted in respect of sums not thus ascertainable,^(d) nor in respect of equitable claims not in the nature of debts,^(e) nor in respect of debts assigned by another creditor to the representative.^(f)

Debts which can be retained

- (a) *Re Giles* [1896] 1 Ch. 956, as modified by *Re Beavan* [1913] 2 Ch., at pp. 600, 602.
- (b) *Re Compton* (1885) 30 Ch. D. 15.

- (c) *Re Morris's Estate* (1874) L. R. 10 Ch. App. 68.
- (d) *Loane v. Casey* (1775) 2 Wm. Bl. 965.
- (e) *Re Duchess of Sutherland* [1914] 2 Ch. 720.
- (f) *Jones v. Evans* (1876) 2 Ch. D. 420.

*Retainer by
co-repre-
sentatives*

2169. A retainer by one of several co-representatives can only be exercised subject to the rights of his co-representatives; and the proceeds must be applied rateably amongst those entitled to retain.

Chapman v. Turner (1738-9) 9 Mod. 268.

[A representative appointed during the minority or lunacy of a person entitled to the grant can retain either for his own debt (*Briers v. Goddard* (1617) Hob. 250), or for that of the minor or lunatic (*Franks v. Cooper* (1799) 4 Ves. 763).]

*Retainer
after repre-
sentative's
death*

2170. If a personal representative dies without having exercised his right of retainer, his representative cannot exercise such right, even though it was claimed during the personal representative's lifetime; unless the latter's representative is also a representative of the original testator.

Re Compton (1885) 30 Ch. D. 15.

*Waiver of
right to
retain*

2171. A personal representative can by his conduct waive his right of retainer;^(a) and if a creditor of the deceased obtains a judgment against such representative in an action in which the right was not asserted, the representative cannot afterwards set up the right of retainer against the judgment.^(b) He

does not lose it merely by failure to assert it, if the occasion to assert it has not arisen.^(c)

(a) *Player v. Foxhall* (1826) 1 Russ. 538.

(b) *Re Marvin* [1905] 2 Ch. 490.

(c) *Re Rhoades* [1899] 2 Q. B., at p. 353.

2172. A personal representative may pay, or retain in respect of, a debt as to which the Statutes of Limitation might be pleaded.^(a) But he may not pay, or retain in respect of, a debt which is unenforceable by reason of non-compliance with the Statute of Frauds;^(b) and he may not pay a debt after it has been declared by the Court to be statute-barred.^(c)

*Payment
of statute
barred debt*

(a) *Stahlschmidt v. Lett* (1853) 1 Sm. & G. 415.

(b) *Re Rowson* (1885) 29 Ch. D. 358.

(c) *Midgley v. Midgley* [1893] 3 Ch. 282.

[After an order for the administration of the estate, the defence of the Statutes of Limitation may be set up by any creditor or legatee (*Shewen v. Vanderhorst* (1831) 1 Russ. & My. 347); but not as against a creditor who is a plaintiff in the administration action (*Briggs v. Wilson* (1853) 5 De G. M. & G. 12; *Fuller v. Redman* (No. 2) (1859) 26 Beav. 614).]

2173. If, in an action against co-representatives, one pleads the Statutes of Limitation, and the other or others do not, the Court accepts the plea;^(a) but (possibly) one representative can (subject to § 2172, *ante*) pay a statute-barred debt against the wish of the others.^(b)

*Plea of
statute by
one of co-
represent-
atives*

(a) *Midgley v. Midgley* [1893] 3 Ch., at p. 302, *per* Lopes, L. J.

(b) *Ibid.*, at p. 297, *per* Lindley, L. J.

Astbury v. Astbury [1898] 2 Ch., at p. 115, *per* Stirling, J.

keeping
alive of
debt

2174. One of several co-representatives can prevent the Statutes of Limitation running in respect of a simple contract debt,^(a) and (possibly) a specialty^(b) debt, in favour of the personal estate of the deceased, by acknowledgment or promise in writing, and (probably) by payment on account of principal or interest.^(c) Neither an acknowledgment or promise, nor a payment, by one representative will render the others personally liable for the debt;^(d) but if the debt is charged on land, a part payment by one of several devisees of that land will prevent the statutes running in favour of any, so that they will all continue to be personally liable to pay it to the extent of assets received.^(e) (*Semble*) a similar rule is applicable to a part payment by one of several co-representatives, made whilst the land is vested in them.^(f)

(a) Statute of Frauds (Amendment) Act, 1828, s. 2.

Re Macdonald [1897] 2 Ch. 181.

(b) *Re Macdonald, ubi sup.*, at p. 187.

(c) *Coope v. Cresswell* (1866) L. R. 2 Ch. App., at pp. 123-4, *per* Lord Chelmsford.

(d) Statute of Frauds (Amendment) Act, 1828, s. 1.
Mercantile Law Amendment Act, 1856, s. 14.

[The result is, that if the co-representative pays away the assets without notice that the debt has been kept alive, he is not personally liable to the creditor (*Re Hollingshead* (1888) 37 Ch. D., at pp. 657-8; *Re Macdonald, ubi sup.*, at pp. 188-9).]

(e) *Re Lacey* [1907] 1 Ch. 330.

[S. 14 of the Mercantile Law Amendment Act does not apply to debts covered by the Real Property Limitation Act, 1874 (*Re Lacey, ubi sup.*, at p. 350).]

(f) This would seem to be the result of the Land Transfer Act, 1897, s. 3 (2).

ORDER IN WHICH DEBTS PAYABLE 1385

[An acknowledgment by one of several devisees in trust is not sufficient to exclude the operation of the Real Property Limitation Act, 1833, s. 42 (1), and keep alive as against the land an obligation to pay rent, or interest in respect of money charged on land (*Astbury v. Astbury* [1898] 2 Ch. 111). *Semble*, this rule will apply to an acknowledgment by one of several co-representatives in whom land is vested under the Land Transfer Act, 1897.]

2175. A personal representative to whom real estate has been devised in trust cannot prevent the Statutes of Limitation running in favour of the persons entitled to the real estate in respect of a debt payable out of the real estate, by making, in his capacity of representative, a payment or acknowledgment of or on account of the debt.^(a) But, *semble*, a representative can keep a debt alive against real estate by an act done while it is vested in him as representative.^(b)

Acknowledgment by devisee in trust

- (a) *Fordham v. Wallis* (1853) 10 Ha., 217. (It is otherwise if the land is vested in him beneficially (*ibid.*).)
Coope v. Creswell (1866) L. R. 2 Ch. App. 112.
Re Lacey [1907] 1 Ch., at pp. 344, 351-2.

[*Quære*: has this rule been affected by the Land Transfer Act, 1897, which vests the real estate in the personal representative?]

- (b) Land Transfer Act, 1897, s. 1 (1).

2176. If a testator creates a trust for the payment of his debts out of his personal estate only, the periods of limitation in respect of such debts are not thereby affected.^(a) But if he creates a trust or

Effect of trust or charge for payment of debts

charge for the payment of his debts out of his real estate,^(b) or if, having created such a trust or charge, he directs his trustees to pay such debts out of a blended fund of realty and personalty,^(c) the period of limitation in respect of simple contract debts thus affected is enlarged to twelve years.^(d)

(a) *Scott v. Jones* (1835) 4 Cl. & Fin. 382.

(b) *Re Stephens* (1889) 43 Ch. D. 39. (The Land Transfer Act, 1897, has not altered the law on this point (*Re Balls* [1909] 1 Ch. 791).)

(c) *Re Raggi* [1913] 2 Ch. 206.

[*Quære*: would the period of limitation be extended as against the personalty?]

(d) Real Property Limitation Act, 1874, ss. 8, 10.

*Running of
Statutes of
Limitation*

2177. Against a creditor who had a complete cause of action before the decease of his debtor, the statutory period of limitation continues to run notwithstanding the decease.^(a) Against a creditor whose cause of action is not complete till after his debtor's decease, the statutory period does not begin to run until the executor accepts office,^(b) or, if there is no executor who accepts office, until a grant of administration is made.^(c)

(a) *Boatwright v. Boatwright* (1873) L. R. 17 Eq. 71.

(b) *Douglas v. Forrest* (1828) 4 Bing. 686, at p. 704.

(c) *Burdick v. Garrick* (1870) L. R. 5 Ch. App., at p. 241.

Atkinson v. Bradford Building Society (1890) 25 Q. B. D. 377.

[The latter rule applies if the completion of the cause of action and the death occur on the same day; unless there is evidence that the cause of action accrued before the death (*Atkinson v. Bradford Building Society*, *ubi sup.*, at pp. 381-382).]

2178. If the estate of a deceased person is insolvent, it may be administered either — (i) by the personal representative out of Court, according to the law applicable to solvent estates;^(a) or (ii) by the Court having jurisdiction in bankruptcy, in accordance with the law of bankruptcy;^(b) or (iii) by the Chancery Division as an insolvent estate.^(c) The Chancery Division may transfer the administration of an insolvent estate to the bankruptcy jurisdiction.^(d)

(a) *Re Hargreaves* (1890) 44 Ch. D., at p. 242, *per* Lindley, L. J.

(b) Bankruptcy Act, 1914, s. 130.

[The petition may be presented either by a creditor or by the representative (*ibid.*).]

(c) Judicature Act, 1875, s. 10.

(d) Bankruptcy Act, 1914, s. 130 (3).

Re Baker (1890) 44 Ch. D. 262.

Re Eade (1906) 94 L. T. 277.

[The last decision sets out the considerations which will influence the Court in coming to a conclusion on this matter.]

2179. The Chancery Division may administer the estate of a deceased person as an insolvent estate, whenever there is good reason to suppose that such estate is not sufficient to pay the debts of the deceased,^(a) together with the costs of administration.^(b) And if there is any doubt as to whether or not the estate is solvent, the Court may direct an enquiry to ascertain the facts.^(c)

(a) *Re Hopkins* (1881) 18 Ch. D., at p. 377.

(b) *Re Leng* [1895] 1 Ch. 652.

(c) *Re Smith* (1883) 22 Ch. D., at p. 592.

*Effect of
Judicature
Act*

2180. In the administration by the Chancery Division of an insolvent estate, the rules of bankruptcy law are applicable on the following subjects, viz. :—

(i) the respective rights of secured and unsecured creditors ;

Judicature Act, 1875, s. 10.

[The Chancery rule allowed a creditor to realize or retain his security and to prove for the whole debt; provided that, by pursuing the two remedies open to him, he did not recover more than the total amount due (*Mason v. Bogg* (1837) 2 My. & Cr., at p. 448). Under the law of bankruptcy, he must, unless he gives up his security, either realize or value it, and prove only for the balance of the debt, if any (*Couldery v. Bartrum* (1881) 19 Ch. D., at pp. 400-401).]

(ii) the debts and liabilities provable ;

Judicature Act, 1875, s. 10.

Re West of England Bank (1879) 12 Ch. D. 823.

[For the bankruptcy rules as to what debts and liabilities cannot be proved, see Bankruptcy Act, 1914, s. 30.]

(iii) the order in which such debts and liabilities are payable ;

Judicature Act, 1875, s. 10.

Re Whitaker [1901] 1 Ch. 9.

[Generally in bankruptcy all debts and liabilities are payable *pari passu* (Bankruptcy Act, 1914, s. 33 (7)). But certain debts are preferred (*ibid.* s. 33 (1)); and these preferences admitted by the law of bankruptcy are now imported into the administration of an insolvent estate by the Chancery Division (Preferential Payments in Bankruptcy Act, 1888; *Re Leng* [1895] 1 Ch. 652; *Re Heywood* [1897] 2 Ch., at pp. 598-9). Apparently, a landlord's right of distress is not, in the Chancery Division, restricted by the bankruptcy rules (*Re Fryman* (1888) 38 Ch. D. 468); but it would seem that the Crown loses its priority (Bankruptcy Act, 1914, s.

151; *Re Whitaker* [1901] 1 Ch., at p. 14; notwithstanding *Re Oriental Bank* (1884) 28 Ch. D. 643, and *Re Churchill* (1888) 39 Ch. D. 174.]

(iv) the valuation of annuities and future and contingent liabilities.

Judicature Act, 1875, s. 10.

[For the bankruptcy rules on this point, see Bankruptcy Act, 1914, s. 30 (3).]

In other respects the general rules of administration, not the special rules of bankruptcy, apply.

Re Leng [1895] 1 Ch., at pp. 655-6.

Re Ambler [1905] 1 Ch. 697.

[These decisions were on the Bankruptcy Act, 1883; but the language of the corresponding provisions of the Act of 1914 is almost identical.]

2181. Even when the estate is being administered in the bankruptcy jurisdiction, the general rules of the law of property, and not the special rules of bankruptcy law which define the assets of a bankrupt, determine what are the assets of the deceased at the time of his death.^(a) But in other respects, when the estate is being administered in bankruptcy, the assets are administered in accordance with the provisions of the Bankruptcy Acts relating to the administration of the property of a bankrupt, so far as the same are applicable.^(b)

*Effect of
Bankruptcy
Act*

- (a) *Re Gould* (1887) 19 Q. B. D. 92 (voluntary settlements).
Hasluck v. Clark [1899] 1 Q. B. 699 (execution).
Re Rhoades [1899] 2 Q. B. 347 (retainer).

[The decisions above quoted were all upon the Bankruptcy Act, 1883, s. 125; but the corresponding provisions (s. 130) of the Act of 1914 are on similar lines, and it is presumed that the decisions still apply.]

(b) ¹ Bankruptcy Act, 1914, s. 130 (5).

*Distribu-
tion by
represent-
ative*

2182. If a personal representative has issued advertisements inviting creditors and others to send in their claims against the estate, similar to those issued by the Court in an action for administration, he may, at the expiration of the time fixed by the advertisements for sending in claims, distribute the assets amongst the persons entitled thereto, without incurring any liability to creditors of whose claims he had no notice at the time of the distribution.^(a) But unpaid creditors and claimants may follow the assets into the hands of the persons who have received them.^(b)

(a) It is immaterial that the creditor has not sent in his claim, if in fact the representative was aware of it (*Re Land Credit Co.* (1872) 21 W. R. 135).

(b) Law of Property Amendment Act, 1859, s. 29.

[As to the rules to be observed in following the assets, see *ante*, Tit. III, § 2148, n.]

TITLE VI—THE ORDER OF RESORT TO ASSETS

2183. In the absence of provisions to the contrary contained in a testament, assets are, as between the different classes of beneficiaries, applicable to the payment of the deceased's unsecured debts in the following order :—

Order in which assets are applicable

- (i) personal estate undisposed of by testament ;

Newbegin v. Bell (1857) 23 Beav. 386.

Re Grainger [1900] 2 Ch. 756.

[A lapsed share of a residuary bequest is not 'undisposed of' for this purpose (*Trethewy v. Helyar* (1876) 4 Ch. D. 53).]

- (ii) personal estate expressly bequeathed ^(a) or conveyed ^(b) subject to, or in trust for, payment of debts ;

- (a) *Browne v. Groombridge* (1819) 4 Madd. 495 (trust).

Webb v. De Beauvoisin (1862) 31 Beav. 573 } (charge).

Re Smith [1913] 2 Ch. 216 }

- (b) *Trott v. Buchanan* (1885) 28 Ch. D. 446 (trust).

- (iii) general or residuary personal estate not specifically bequeathed nor exonerated nor exempted ;

Manning v. Spooner (1796) 3 Ves., at p. 117.

[It is this rule which saves specific and demonstrative legacies (*ante*, Sect. I, Tit. IV, §§ 1998, 2003) from abatement until the funds available to satisfy general legacies have been exhausted.]

- (iv) real estate appropriated to, or devised in trust for, the payment of debts;

Powis v. Corbet (1747) 3 Atk. 556.

Manning v. Spooner (1796) 3 Ves. 114.

[If the testator's intention to that effect is clear (*Burton v. Knowlton* (1796) 3 Ves. 106), but not otherwise (*Brummel v. Prothero* (1796) *ibid.* 110), real estate devised in trust for payment of debts may even be resorted to before the general personal estate.]

- (v) real estate passing to the heir by inheritance,^(a) including lapsed and disclaimed devises;^(b)

(a) *Harmood v. Oglander* (1803) 8 Ves., at pp. 124-5.

Scott v. Cumberland (1874) L. R. 18 Eq. 578 (but see *Trethwey v. Helyar*, *ubi sup.*, at p. 57).

(b) *Re Sitwell* (1913) 57 Sol. Jo. 730.

[If devised land escheats to the Crown, it does not appear to be quite settled whether it ranks, for this purpose, as land descended or as land devised (*Evans v. Brown* (1842) 5 Beav., at pp. 122-3). The Land Transfer Act, 1897, does not affect the question; because it does not bind the Crown (*Goods of Hartley* [1899] P. 40).]

- (vi) real estate charged with the payment of debts;

Harmood v. Oglander, *ubi sup.*, at p. 125.

Re Salt [1895] 2 Ch. 203.

Re Roberts [1902] 2 Ch. 834.

[This rule is not affected by the Land Transfer Act, 1897 (*Re Kempster* [1906] 1 Ch. 446).]

- (vii) general pecuniary legacies (other than legacies charged on real estate) rateably;

Farquharson v. Floyer (1876) 3 Ch. D. 109.

Re Bawden [1894] 1 Ch. 693.

[Portions (*Re Saunders-Davies* (1887) 34 Ch. D. 482), and legacies (*Re Bawden* [1894] 1 Ch. 693), charged on real estate, do not contribute until after the real estate on which they are charged is exhausted.]

(viii) devises and specific legacies, rateably;

Tombs v. Roch (1846) 2 Coll. 490.

Powell v. Riley (1871) L. R. 12 Eq. 175.

Re Maddock [1902] 2 Ch., at p. 233.

(ix) real and personal estate over which a testator has a general testamentary power of appointment, which he has expressly exercised by his testament;

Fleming v. Buchanan (1853) 3 De G. M. & G. 976.

Beyfus v. Lawley [1903] A. C. 411.

[But the execution of such a power by a general bequest of personal property, as provided by the Wills Act, 1837, s. 27, causes the property to pass and to be applied in like manner as the residuary personal estate (*Williams v. Williams* [1900] 1 Ch. 152). *Quære*: whether an appointment by deed will make the fund assets (*Townsend v. Windham* (1750) 2 Ves. Sen., at p. 10).]

(x) widow's paraphernalia (*ante*, Bk. III, Sect. IX, Tit. II, § 1549),^(a) and (*semble*) *donationes mortis causâ* (*ante*, Sect. I, Tit. IV. §§ 2040-2046)^(b) rateably.

(a) *Tynt v. Tynt* (1729) 2 P. Wms. 542.

(b) *Tate v. Hilbert* (1793) 2 Ves. Jun., at p. 120.

Tate v. Leithead (1854) Kay, 658.

[There are clear *dicta* to the effect that *donationes mortis causâ* are liable for payment of debts in default of other assets; but the precise order in which they are resorted to does not appear to have been settled.]

2184. A charge of debts upon his real estate by a testator does not, in favour of his residuary legatees, though it does in favour of his pecuniary legatees,^(a) exonerate his general personal estate from its primary

Effect of charge of debts

liability for debts; unless such general personal estate is expressly exonerated by him.^(b) And if a testator creates a special fund for the payment of debts, and bequeaths out of his general personal estate legacies which fail to take effect by lapse or otherwise, the special fund will, *pro tanto*, be relieved from the liabilities specially charged upon it.^(c)

(a) *Re Salt* [1895] 2 Ch. 203.

Re Roberts [1902] 2 Ch. 834.

(b) *Boote v. Blundell* (1815) 1 Mer., at pp. 220–221, *per* Lord Eldon, C.

Allan v. Gott (1872) L. R. 7 Ch. App., at pp. 442–443.

Kilford v. Blaney (1885) 31 Ch. D., at p. 61.

[The rule applies, even if the real estate is outside the jurisdiction of the Court (*Re Smith* [1913] 2 Ch. 216).]

(c) *Dacre v. Patrickson* (1860) 1 Dr. & Sm. 182.

Kilford v. Blaney (1885) 31 Ch. D. 56.

*Effect of
creating a
'mixed
fund'*

2185. If a testator creates a mixed fund of real and personal estate, and directs that all or a certain number of his debts shall be paid thereout, the residuary bequest (if any) is wholly or *pro tanto* discharged from liability for such debts. And, as between the different properties comprised in such mixed fund, the debts will be apportioned rateably.

Roberts v. Walker (1830) 1 Russ. & M. 752.

*Incum-
brances*

2186. Liabilities incident to any particular asset which fall due after the owner's decease,^(a) and charges upon any particular asset neither created^(b) nor adopted

as his own^(c) by the deceased, are borne by the beneficiary entitled to that asset. But liabilities arising under a contract made by the deceased, though for the benefit of any particular asset, are (subject to §§ 2188 and 2189, *post*) primarily borne by the deceased's general personal estate.^(d)

- (a) *Fitz Williams v. Kelly* (1852) 10 Ha. 266 (fines due on a lease).
Addams v. Ferick (1859) 26 Beav. 384 (calls on shares).
Re Betty [1899] 1 Ch. 821 (obligations under a lease).
- (b) *Swainson v. Swainson* (1856) 6 De G. M. & G. 648.
- (c) *Townshend v. Mostyn* (1858) 26 Beav. 72.

[It is on this principle that the cost of up-keep of a specific legacy after the testator's death falls on the specific legatee (*Re Pearce* [1909] 1 Ch. 819; *ante*, Sect. I, Tit. IV, § 2009).]

- (d) *Cooper v. Jarman* (1860) L. R. 3 Eq. 98.
Re Day [1898] 2 Ch. 510.

2187. A charge created by a testator upon chattels personal specifically bequeathed, is primarily borne by the general personal estate not specifically bequeathed.^(a) But if such estate is insufficient for the payment of the testator's debts, the legatee of the property charged must, as between himself and other specific legatees or devisees, in the absence of direction to the contrary in the testament, bear the burden of the charge.^(b)

*Charge
on specific
legacy*

- (a) *Lewis v. Lewis* (1871) L. R. 13 Eq., at pp. 225-6.
Bothamley v. Sherson (1875) L. R. 20 Eq. 304, at pp. 315-6.
- (b) *Re Butler* [1894] 3 Ch. 250.

[A mere direction for payment of debts is not evidence of a contrary intention for this purpose (*Re Butler, ubi sup.*).]

*Charges
on land*

2188. The liability to pay or satisfy a mortgage, an equitable lien for unpaid purchase money, or other equitable charge created by a deceased person upon real estate or chattels real,^(a) is, as between the devisee or legatee of such property,^(b) or the heir of such person taking such property by intestacy, and his other devisees, legatees, heirs, or his next of kin,^(c) borne primarily by the devisee, legatee, or heir taking the property so charged,^(d) unless a contrary intention has been declared by the deceased in his testament, deed, or other document.^(e) But the person taking the property subject to such mortgage, lien, or charge, does not become personally liable to pay the debt charged thereon.^(f)

(a) *Re Kershaw* (1888) 37 Ch. D. 674.

(b) *Re Anthony* [1893] 3 Ch. 498.

(c) *Re Fraser* [1904] 1 Ch., at p. 735.

(d) Real Estate Charges Acts, 1854, 1867, 1877.

(e) *Ibid.*

Re Campbell [1893] 2 Ch., at pp. 214-5.

(f) *Syer v. Gladstone* (1885) 30 Ch. D. 614.

[A general charge of debts or legacies by the deceased's testament is not within the meaning of this § (*Hepworth v. Hill* (1862) 30 Beav. 476). Each property bears its own charge; and there is no contribution among the beneficiaries (*Re Holt* (1916) 85 L. J. Ch. 779).]

*'Contrary
intention'*

2189. Neither a general direction given by a testator that his debts shall be paid out of his personal estate,^(a) nor a charge of, or direction for, payment of debts upon or out of residuary real or personal estate or residuary real estate,^(b) is a declaration of a contrary intention within the meaning of § 2188,

ante. In order that § 2188 may be excluded, it must appear that the deceased has either expressly, or by necessary implication, referred to the debts secured by mortgage, lien, or charge, and directed them to be discharged out of his general personal estate.^(c)

(a) Real Estate Charges Act, 1867, s. 1.

(b) Real Estate Charges Act, 1877, s. 1.

(c) *Re Valpy* [1906] 1 Ch. 531.

[The right of a pecuniary legatee to payment of his legacy was, in equity, before the passing of the Real Estate Charges Acts, prior to the right of a devisee of mortgaged land to have the mortgage debt paid out of the personalty; and this rule still holds good (*Re Fry* [1912] 2 Ch. 86). Therefore, the fact that these Acts are excluded by the testament does not deprive the legatee of his priority (*Re Smith* [1899] 1 Ch., at pp. 371-3).]

2190. The provisions of §§ 2184 and 2185 relating to the payment of debts charged upon real estate^(a) or payable out of a mixed fund,^(b) apply, *mutatis mutandis*, to legacies similarly so charged or payable. *Charges of legacies*

(a) *Elliott v. Dearsley* (1880) 16 Ch. D. 322.

Kilford v. Blaney (1885) 31 Ch. D. 56.

Re Boards [1895] 1 Ch. 499.

(b) *Allan v. Gott* (1872) 7 Ch. App. 439.

Re Spencer Cooper [1908] 1 Ch. 130.

2191. In the absence of special direction in the testament, and subject to §§ 2192 and 2193, *post*, a legatee has no claim upon the real estate of the deceased.^(a) But a testator may make his real estate, or *Legatees no primâ facie claim on real estate*

any other fund, primarily or exclusively liable to the payment of legacies.^(b)

(a) *Robertson v. Broadbent* (1883) L. R. 8 App. Ca., at p. 815, *per* Lord Selborne, C.

[*Semble*, this rule has not been affected by the passing of the Land Transfer Act, 1897 (see s. 2 (3) of that Act).]

(b) *Dickin v. Edwards* (1844) 4 Ha. 272.

[If, however, in the last case, the testator evinces an intention that the legacies shall in any event be paid, the legatees will, in the event of the fund primarily liable proving insufficient, be entitled to have recourse to the general personal estate (*Dickin v. Edwards*, *ubi sup.*, at p. 276).]

*Implied
charge of
debts or
legacies*

2192. If a testator directs payment of his debts, or bequeaths pecuniary legacies, and the direction or bequest is either followed or preceded by a gift of the residue of his real and personal estate, the debts or legacies are charged upon his real estate.

Greville v. Browne (1859) 7 H. L. C. 689.

Re Salt [1895] 2 Ch. 203.

Re Balls [1909] 1 Ch. 791, at p. 795.

The word "residue" need not be used, if the meaning of the testator is otherwise clear (*Re Balls*, *ubi sup.*: *Re Bawden* [1894] 1 Ch. 693; *Re Roberts* [1902] 2 Ch. 834).]

'Marshalling'

2193. If, by the action of a creditor, the order of resort to the assets of a deceased person for payment of debts (*ante*, § 2183) has been disturbed, a

beneficiary who has suffered by such disturbance can claim to stand in the place of the creditor, and to obtain satisfaction from the fund primarily liable for the debt, to the extent to which the fund out of which the beneficiary has a *primâ facie* claim to satisfaction has been depleted.

Aldrich v. Cooper (1803) 8 Ves., at pp. 394-7, *per* Lord Eldon, C.
Trimmer v. Baynes (1803) 9 Ves., at p. 211, *per* Grant, M. R.

Thus : —

- (i) if a creditor obtains payment of his debt from the personal estate of the deceased, a pecuniary legatee can, to the extent of such payment, enforce his claims against the real estate descended,^(a) or real estate charged with the payment of debts;^(b)

(a) *Galton v. Hancock* (1743) 2 Atk. 427.

Aldrich v. Cooper (1803) *ubi sup.*, at p. 396.

(b) *Strickland v. Strickland* (1839) 10 Sim. 374.

Paterson v. Scott (1852) 1 De G. M. & G. 531.

[A charge of debts on real estate can be indirectly created in manner described in § 2192, *ante* (*Re Salt* [1895] 2 Ch. 203).]

- (ii) a specific legatee, whose legacy has been taken for payment of debts, can to that extent enforce his claims, not only against the real estate descended or charged, but against the general personal estate,^(a) and also against the real estate devised, but not charged with debts, in the proportion which the value of the personal estate

specifically bequeathed to him bears to the realty devised;^(b)

(a) *Bothamley v. Sherson* (1875) L. R. 20 Eq. 304.

(b) *Re Saunders-Davies* (1887) 34 Ch. D. 482.

[A devisee (including a residuary devisee (*ante*, Sect. I, Tit. IV, § 2001)) would have a similar claim to contribution against a specific legatee (*Re Saunders-Davies*, *ubi sup.*, at p. 495).]

(iii) if a legatee, whose legacy is charged by the testament on the real estate of the testator, obtains payment from the personal estate, a legatee whose legacy is not so charged can, to the extent of such payment, enforce his claims against the real estate;

Scales v. Collins (1852) 9 Ha. 656.

(iv) a widow, whose paraphernalia have been employed in the payment of her deceased husband's debts, can, to the extent of such employment, enforce her claims against his general personal estate,^(a) his real estate undisposed of by his testament,^(b) his real estate charged with the payment of debts,^(c) and (*semble*) his real estate devised.^(d)

(a) *Tynt v. Tynt* (1729) 2 P. Wms. 542.

(b) *Tipping v. Tipping* (1729) 1 P. Wms. 730.

Snelson v. Corbet (1746) 3 Atk. 369.

(c) *Inclendon v. Northcote* (1746) *ibid.* 430.

Boyntun v. Boyntun (1784) 1 Cox, Eq. 106.

(d) *Tynt v. Tynt*, *ubi sup.*

[The doubt is caused by the later decision of *Probert v. Clifford* (1739) 1 Ambl. 6, where Lord Hardwicke, C., apparently unaware

of the earlier case, refused to allow a widow to marshal against devisees; saying that a husband had power to dispose of his wife's paraphernalia during his lifetime. But the reasoning of *Tynt v. Tynt*, that a devisee cannot be in a better position than an heir, seems to have been subsequently followed. At any rate it would seem that, inasmuch as the widow is in the position of a simple contract creditor in respect of her paraphernalia (*Townsend v. Windham* (1750) 2 Ves. Sen., at p. 7, *per* Lord Hardwicke, C.), she ought, since the passing of the Administration of Estates Act, 1833, to be preferred to the devisees.]

MARSHALLING BY CREDITORS

Formerly the doctrine of marshalling assets was almost more important for creditors than for beneficiaries; but, owing to the operation of the Administration of Estates Act, 1869, which placed specialty and simple contract debts on the same footing, its importance to creditors has practically disappeared. Still, it may conceivably apply to them; as, for instance, when judgment or other creditors (*ante*, Tit. V, § 2161) have absorbed the whole of the legal assets, and claim to come upon the equitable (*ante*, Tit. IV, § 2159). And, *inter vivos*, the doctrine may apply to secured creditors (*ante*, Bk. III, Sect. IV, Tit. II, § 1421).

TITLE VII—DUTIES AND POWERS OF THE PERSONAL REPRESENTATIVE

*Burial of
deceased*

2194. An executor has the custody of the body of the deceased until its burial or cremation,^(a) and is not obliged to obey the directions given by the deceased as to its disposal.^(b) He must bury or cremate it^(c) in a manner suitable to the amount of the deceased's assets and station in life.^(d) The purchase of mourning garments for the use of the deceased's relatives is not a part of the funeral expenses which the executor may incur.^(e)

(a) *Williams v. Williams* (1882) 20 Ch. D., at p. 664, *per* Kay, J.

[As to cremation, see *R. v. Price* (1884) 12 Q. B. D. 247, and the Cremation Act, 1902.]

(b) *Williams v. Williams*, *ubi sup.*, at p. 665.

(c) *Sharp v. Lush* (1879) 10 Ch. D., at p. 472.

(d) *Hancock v. Podmore* (1830) 1 B. & Ad. 260.

Edwards v. Edwards (1834) 2 Cr. & M. 612.

(e) *Johnson v. Baker* (1825) 2 C. & P. 207.

Bridge v. Brown (1843) 2 Yo. & C. Ch. Ca. 181.

[*Semble*, as between the personal representative and the beneficiaries, a direction to furnish mourning garments, or to erect a tombstone, would be binding as a legacy.]

*Inventory
of estate*

2195. The personal representative must make and produce an inventory of the deceased's estate, if re-

quired to do so by the Court upon the application of any one interested in the estate.

21 Hen. VIII (1529) c. 5, s. 2.

[In practice, the representative never exhibits the inventory unless he is called upon to do so (*Myddleton v. Rushout* (1797) 1 Phill. 244; *Phillips v. Bignall* (1811) 1 Phill. at p. 240). The place of the inventory is taken by the accounts rendered by the personal representative to the Inland Revenue authorities for the purpose of assessing the Death Duties.]

2196. The personal representative must collect and realize the estate of the deceased within a time which is, in the circumstances of the estate, reasonable.^(a) He must call in unsecured debts due to the estate;^(b) but he need not call in a debt secured upon apparently adequate real security.^(c) He is not liable for failure to secure payment, if he has done all he could to obtain it.^(d)

*Realiza-
tion of
assets*

(a) *Grayburn v. Clarkson* (1868) L. R. 3 Ch. App., at p. 606.

[*Primâ facie*, a year is a reasonable time; and if the representative takes longer, the onus is on him to justify the delay (*ibid.*).]

(b) *Powell v. Evans* (1801) 5 Ves., at p. 844.

(c) *Re Chapman* [1896] 2 Ch., at p. 778.

[By virtue of s. 30 of the Conveyancing Act, 1881, a personal representative of a mortgagee can now re-convey mortgaged property to the mortgagor upon redemption, even though it consists of real estate; and, by the effect of s. 21 (4) of the same statute, he can exercise the statutory power of sale given to a mortgagee by the Act.]

(d) *Clack v. Holland* (1854) 19 Beav., at pp. 271-2.

[Even if he takes no steps to enforce payment, the representative may escape liability, if he can show that he had reasonable grounds

for belief that such steps would have been ineffectual (*ibid.*). But in such a case the onus of proof is on him (*Re Brogden* (1888) 38 Ch. D., at p. 568).]

*No duty
to invest*

2197. In the absence of directions to the contrary in the testament, the personal representative is not obliged to invest the deceased's money;^(a) but, if he leaves it at a bank, he must keep it on a separate account.^(b)

(a) *Johnson v. Newton* (1853) 11 Ha. 160.

(b) *Wilks v. Groom* (1856) 25 L. J. Ch., at p. 729.

[This is an important point in which a personal representative differs from a trustee (*ante*, Bk. III, Sect. XVII, Tit. III, §§ 1785, 1794).]

*Application
of Trustee
Acts*

2198. The provisions of the Trustee Acts applicable to trustees are applicable also to the duties incident to the office of the representative of a deceased person.

Trustee Act, 1893, s. 50.

Dowse v. Gorton [1891] A. C., at p. 204, *per* Lord Macnaghten.

[For particulars of these provisions, see *ante*, Bk. III, Sect. XVII, Tit. III.]

*Manage-
ment of
property*

2199. If any of the property of the deceased cannot be at once realized, the personal representative has the powers of management necessary to maintain its value.

Strickland v. Symons (1883) 22 Ch. D., at p. 671.

[The principle is necessarily vague; but the illustration given in the case quoted is that of a ship which is allowed by the representative to complete her voyage, or upon which money is expended to enable her to earn freight. The most striking illustration of the principle is, however, that described in the next §.]

2200. The representative may carry on a business belonging to the deceased with a view to winding it up^(a) or of selling it as a going concern.^(b) If authorized by the testator, he may (as between himself and the beneficiaries) carry it on for an indefinite period;^(c) but none of the assets may be invested in it without the testator's authority,^(d) and, if such authority is given, the amount invested must not exceed that authorized.^(e)

Carrying on deceased's business

- (a) *Collinson v. Lister* (1855) 20 Beav. 356.
- (b) *Dowse v. Gorton* [1891] A. C., at p. 199, *per* Lord Herschell.
O'Neill v. McGroarty [1915] 1 Ir. R., at p. 17, *per* O'Connor, M. R.
- (c) *Re Chancellor* (1894) 26 Ch. D. 42.
Re Crowther [1895] 2 Ch. 56.
Re Oxley [1914] 1 Ch. 613.

[In *Collinson v. Lister*, *ubi sup.*, it is laid down that the business can only be carried on for the purpose of winding up. But in *Dowse v. Gorton*, *ubi sup.*, at p. 199, Lord Herschell says that it can also be carried on (even as against the creditors) with a view to its sale as a going concern. In such a case, however, the business can only be carried on for a time which is in the circumstances reasonable (*Re Smith* [1896] 1 Ch. 171).]

- (d) *Re Hodson* (1818) 3 Madd. 138.
Cutbush v. Cutbush (1839) 1 Beav. 184.
McNeillie v. Acton (1853) 4 De G. M. & G. 744.
- (e) *Ex parte Garland* (1804) 10 Ves., at p. 120.

[Of course in any case the representative is bound to complete pending contracts entered into by the deceased (*Marshall v. Broadhurst* (1831) 1 Cr. & J. 403). But, *semble*, such completion may

be a preference (*ante*, Tit. V, § 2165). For the effect of carrying on a business upon the rights of beneficiaries and creditors, see *post*, Tit. VIII, §§ 2214–2216.]

*Powers of
disposition*

2201. The personal representative has, for the purpose of duly administering the assets, the power to sell, mortgage, or pledge the real and personal estate vested in him;^(a) and neither creditor,^(b) beneficiary,^(c) nor co-representative^(d) can, *primâ facie*, impeach the title of the purchaser, mortgagee, or pledgee from or of the representative.

- (a) Land Transfer Act, 1897, s. 1.
Nugent v. Gifford (1738) 1 Atk. 463.
Mead v. Lord Orrery (1745) 3 Atk., at p. 337.
Scott v. Tyler (1788) 2 Dick., at p. 725.
Norwood's and Blake's Contract [1917] 1 Ir. 472.
- (b) *Nugent v. Gifford*, *ubi sup.*
Mead v. Lord Orrery, *ubi sup.*
Whale v. Booth (1785) 4 T. R. 625; n., *per* Lord Mansfield, C. J.
- (c) *Ewer v. Corbet* (1723) 2 P. Wms. 148.
Medd v. Lord Orrery, *ubi sup.*
- (d) *McLeod v. Drummond* (1805) 14 Ves. 353; 17 Ves. 152.
Attenborough v. Solomon [1913] A. C., at p. 83, *per* Lord Hal-
dane, C.

But the sale, mortgage, or pledge can be set aside if: —

- (i) the person seeking to set it aside can prove that the purchaser, mortgagee, or pledgee knew that it was made fraudulently, or otherwise than in a due course of administration,^(a) or that it was made without valuable consideration, or for an illusory consideration;^(b)

- (a) *Scott v. Tyler*, *ubi sup.*, at p. 724.
McLeod v. Drummond (1811) 17 Ves., at p. 170, *per* Lord Eldon, C.

- (b) *Scott v. Tyler*, *ubi sup.*, at pp. 725-6, *per* Lord Thurlow, C.
Rice v. Gordon (1847) 11 Beav. 265, 270.

[It is on this principle that a sale or pledge of the assets by the representative to satisfy his private debt is invalid when the facts are known to the purchaser or pledgee (*Re Morgan* (1881) 18 Ch. D., at p. 98, *per* Fry, J.).]

or —

- (ii) the representative creates a merely equitable charge upon the deceased's property for his own purposes, even in favour of a person who had no notice that he was dealing with a representative.

Re Morgan (1881) 18 Ch. D. 93.

2202. Any one of several co-representatives can give a good legal title to any part of the personal estate of the deceased. *Powers of single representative*

Cole v. Miles (1852) 10 Ha. 179.

[But if one of several co-representatives, after he has ceased to own any part of the estate as representative, and has begun to own it as trustee, sells or pledges it without the assent of his co-trustee, the transaction can be set aside as against the purchaser or pledgee (*Attenborough v. Solomon* [1913] A. C. 76).]

But:—

- (i) the consent of all the executors who prove the testament is necessary to the disposition of any part of the real estate of a testator;

Land Transfer Act, 1897, s. 2 (2).

Conveyancing Act, 1911, s. 12.

[It may be noted also that the transfer of shares in limited and other companies, and of stock registered in the books of the Bank

Z Z

of England, is governed by special rules (Companies (Consolidation) Act, 1908, s. 22 (1); National Debt Act, 1870, s. 23).]

- (ii) the Court may refuse to enforce an equitable claim founded on an act done by one representative against the wish of his co-representatives;

Lepard v. Vernon (1813) 2 V. & B. 51.

Sneeshy v. Thorne (1855) 7 De G. M. & G. 399.

Re Ingham [1893] 1 Ch., at p. 360.

- (iii) one representative cannot, without the sanction of the Court, sell any part of the assets to another.

Re Norrington (1879) 13 Ch. D. 654.

*Legatee
also a rep-
resentative*

2203. The fact that a legatee is also a personal representative of the testator does not prevent him giving a good title as legatee to a purchaser for valuable consideration, provided that—

- (i) the purchaser has no notice of any debts of the testator remaining unpaid; and
(ii) the circumstances are such that the purchaser is entitled to assume an assent by the personal representative to the legacy; and

Graham v. Drummona [1896] 1 Ch. 968.

- (iii) the property purchased does not remain under the control of the representative^(a)

or the Court^(b) for the purpose of administering the estate of the testator.

(a) *Noble v. Brett* (1858) 24 Beav. 499.

(b) *Hooper v. Smart* (1875) 1 Ch. D. 90.

[*Seemle*, the same principle would apply to an alienation by a devisee who was also a personal representative.]

2204. Where a testator has charged his real estate, or any specific portion thereof, with the payment of debts or legacies or other specific sum of money, and has not devised the whole of his interest in such real estate to trustees, or to any persons charged with the payment of debts or legacies, nor made any express provision for the raising of such sum, the executor or executors for the time being named in his testament, and any persons in whom the executorship for the time being becomes vested, may raise such debts, legacies or sum by sale or mortgage of such real estate, as they may think proper.

*Sale of
real estate
not vested
in representative*

Law of Property Amendment Act, 1859, ss. 14, 16, 18.

[Before the passing of the above Act, the personal representative, as such, had nothing to do with the deceased's real estate; and, even since the passing of the Land Transfer Act, 1897, the legal estate in copyholds does not vest in him as such. The law, therefore, as to the circumstances under which the executor might be able to deal with real estate not vested in him by operation of law, though much diminished in importance, still applies (subject to the Act of 1859) to the legal estate in copyholds. It may be summarized as follows:

(i) A testator might by his testament expressly give his executors a power to sell, without giving them any estate in the land (*Doe d. Hampton v. Shotton* (1838) 9 A. & E. 905). Till the exercise of

Z Z 2

such a power, the estate vested in the heir or devisee (*Warneford v. Thompson* (1797) 3 Ves. 513). The power could be exercised by the executors who had proved, without the concurrence of those who had renounced (21 Hen. VIII (1529) c. 4); but it was not exercisable by an administrator (*Re Clay and Tetley* (1880) 16 Ch. D. 3).

(ii) A testator might have devised an estate in the land to his executors on trust to fulfil certain purposes (Co. Litt. 113 a). If the land so devised was charged with the payment of debts and legacies, the purchasers were not bound to see to the application of the purchase money; but if it was charged with the payment of legacies only, they were so bound (*Johnson v. Kennett* (1835) 3 My. & K., at p. 630; *Re Henson* [1908] 2 Ch. 356).

(iii) A testator might have given his executors power by implication to deal with his real estate. Thus a direction in the will that such real estate should be sold or mortgaged gave the executors power to sell or mortgage if the purchase or mortgage money was distributable by them (*Curtis v. Fulbrook* (1849) 8 Ha. 278). But, though a general charge of debts on the real estate might give the executors an implied power of sale (*Sissons v. Chichester* [1916] 2 Ch. 75), a devise to trustees on a trust to pay debts would negative such implied power (*Colyer v. Finch* (1856) 5 H. L. C., at p. 922, *per* Lord Cranworth, C.).

To obviate difficulties which arose as to these implied powers, the provision in the text was made by the Law of Property Amendment Act, 1859. The powers given by that statute do not apply if the lands have been devised in fee or in tail to a devisee charged with debts or legacies (s. 18); but this exception only covers an immediate devise, and not an executory devise which does not take effect immediately on the death (*Barrow-in-Furness Corporation and Rawlinson's Contract* [1903] 1 Ch. 339). Having regard to the expressions of the Court in *Re Clay and Tetley*, *ubi sup.*, it seems probable neither the statutory nor the other powers above described can be exercised by an administrator.]

Under-
leases by a
represent-
ative

2205. A personal representative may grant an underlease of the leasehold property of the deceased, but only if this course is necessary for the due administration of the estate; and the underlessee only

gets a good title if in fact it was necessary to make the underlease. The representative cannot give the underlessee an option to purchase at a future time.

Oceanic Steam Navigation Co. v. Sutherland (1880) 16 Ch. D. 236.

[*Semble*, since the passing of the Land Transfer Act, 1897, the same principle will apply to leases of real estate.]

2206. Subject to the directions of the testament (if any), a personal representative may pay or allow any debt or claim against the deceased's estate on any evidence that he thinks sufficient;^(a) and he has the powers with regard to accepting a compromise of a claim by the estate described in Bk. III, Sect. XVII, Tit. IV, § 1807.^(b) He may (possibly) compromise the claim of a co-representative against the estate; provided that such a compromise is beneficial to the estate.^(c) But a compromise made between co-representatives as to the claim of one of them will not bar the rights of those interested in the estate to investigate the accounts.^(d)

*Allowance
of claims
and com-
promises*

(a) Trustee Act, 1893, ss. 21 (1), 50.

(b) *Ibid.* ss. 21 (2), 50.

(c) *Re Houghton* [1904] 1 Ch. 622.

[But see the remarks of Lord Eldon in *Cooke v. Collingridge* (1823) Jac., at p. 621; and *De Cordova v. De Cordova* (1879) L. R. 4 App. Ca., at p. 703. Such a compromise should never be entered into without the sanction of the Court (*Re Houghton, ubi sup.*, at p. 626).]

(d) *Re Fish* [1893] 2 Ch. 413.

Appropriation to meet legacies

2207. A personal representative can, with the consent of a legatee who is under no disability, and whose legacy is vested, appropriate a specific portion of the testator's estate in payment of the legacy;^(a) and such an appropriation cannot be questioned by the other beneficiaries, even though the estate is subsequently reduced in value, if, at the time when it was made, it was a fair and honest arrangement.^(b) Any profit or loss upon a fund so appropriated belongs to or is borne by the legatee.^(c)

(a) *Re Lepine* [1892] 1 Ch. 210.

(b) *Ibid.*, at pp. 216, 218.

Re Brookes [1914] 1 Ch. 558 (trustees).

(c) *Re Hall* [1903] 2 Ch., at p. 231.

Legacies not immediately payable

2208. If the legatee of a vested legacy cannot be found or is under disability, or if a legacy is settled upon successive trusts, the personal representative can appropriate and invest a sum of money to answer the legacy.^(a) The representative will then be under no further personal liability in respect of the legacy; but, unless the sum was appropriated under an order of the Court, the residuary estate is not freed from liability if the sum appropriated proves to be insufficient.^(b)

(a) *Re Hall* [1903] 2 Ch., at p. 233, *per* Romer, L. J.

[Such investment must be one authorized by the testator or by law (*Re Beverley* [1901] 1 Ch. 681); unless the Court for special reasons should sanction an unauthorized investment (*Re Cooke* [1913] 2 Ch. 661).]

(b) *Re Salaman* [1907] 2 Ch., at p. 50 (reversed on another point).

2209. The rule stated in § 2208 applies also to a *Contingent legacies* contingent legacy, if either no provision is made for the application of the intervening interest on the legacy; or some or all of such income is, pending the contingency, to go to the legatee.^(a) But in such a case, pending the contingency, either the fund so appropriated and the interest thereon, or the fund without the interest which has been paid to the legatee, forms part of the estate of the deceased.^(b)

(a) *Re Hall* [1903] 2 Ch., at p. 233, *per Romer, L. J.*

(b) *Ibid.*, at pp. 233-4.

[Therefore, contrary to the rule which applies when the testator has himself directed the legacy to be set apart (*Re Woodin* [1895] 2 Ch., at pp. 314, 315), the legatee, even on fulfilment of the contingency, will not be entitled to the intervening income.]

2210. Whenever there is a doubt as to the person *Payment of legacies into Court* entitled to receive a payment from the estate, and whenever any person entitled to receive a payment cannot give a valid discharge for such payment, the representative may pay the sum due into Court.^(a) If he pays into Court where no reasonable doubt exists, merely in order to escape responsibility, he must bear the costs occasioned by his act.^(b)

(a) *Re Parker's Trusts* (1888) 58 L. J. Ch., at pp. 24-5.

(b) *Re Elliot's Trusts* (1873) L. R. 15 Eq. 194.

2211. The provisions of Bk. III, Sect. XVII, Tit. *Survival of powers* IV, § 1810, apply to co-representatives;^(a) unless it is

clear that a testator intended to give powers only to the persons named in their individual capacity, and not to them or any one who might succeed them in the office of his representative.^(b)

(a) Trustee Act, 1893, s. 22.
Conveyancing Act, 1911, s. 8.

(b) *Re Smith* [1904] 1 Ch., at p. 144.

TITLE VIII — PERSONAL RIGHTS AND LIABILITIES OF THE REPRESENTATIVE

2212. The representative is personally liable, irrespective of assets, to strangers for any wrongful acts done^(a) or contracts made by him^(b) in the course of the administration of the estate. *Personal responsibility to strangers*

(a) *Re Raybould* [1900] 1 Ch. 199.

(b) *Labouchere v. Tupper* (1857) 11 Moo. P. C., at p. 221.

Farball v. Farball (1871) L. R. 7 Ch. App., at p. 128.

Watling v. Lewis [1911] 1 Ch. 414.

[The last case shews that even an express attempt to negative such liability by a clause in the contract will be ineffectual.]

2213. When acts are done or contracts are entered into by a representative in the regular pursuance of powers given by law to him, he is entitled to be indemnified in respect of his liability thereby incurred, out of the assets, in priority to the creditors and beneficiaries of the deceased;^(a) and this right of indemnity exists notwithstanding that the estate is insolvent.^(b) *Indemnity of representative*

(a) *Benett v. Wyndham* (1862) 4 De G. F. & J. 259 (trustee).

Sharp v. Lush (1879) 10 Ch. D., at p. 472 (funeral expenses).

Stott v. Milne (1884) 25 Ch. D., at p. 715, *per* Lord Selborne, C. (costs).

Re Raybould, ubi sup.

(b) Bankruptcy Act, 1914, s. 33 (5), 130 (6).

[The authorities usually speak only of funeral and testamentary expenses; but it is difficult to see why the same principle should not apply to liability incurred by other acts similarly authorized — e.g. acts properly done in the course of carrying on the deceased's business for the purpose of winding it up (*Dowse v. Gorton* [1891] A. C., at p. 203, *per* Lord Macnaghten). In fact this extension appears to be implied by *Re Raybould, ubi sup.*]

*Limited
indemnity*

2214. If the representative does acts^(a) or enters into contracts^(b) in the regular pursuance of a power conferred upon him by the testator, he is entitled (as against the beneficiaries) to be indemnified against liability arising therefrom, out of any assets allowed by the testator to be employed in the execution of such power.^(c)

(a) *Re Raybould* [1900] 1 Ch. 199.

(b) *Ex parte Garland* (1804) 10 Ves., at p. 120.

Re Johnson (1880) 15 Ch. D. 548.

Re Evans (1887) 34 Ch. D. 597.

(c) *Ex parte Garland* (1804) 10 Ves. 110.

[In *O'Neill v. McGrorty* [1915] 1 Ir. R. 1, it was held that where no specific fund had been set apart by the testator, a receiver and manager appointed by the Court to carry on the testator's business had a right to resort to the general estate, including such parts of it as had been carried to the separate credits of legatees.]

*Restric-
tions on in-
demnity*

2215. The representative's right of indemnity under § 2214 is subject to (i) the claims of all the creditors of the deceased who cannot be proved to have assented expressly or by their conduct to the exercise of the power;^(a) (ii) the rights of all legatees who have actually been paid;^(b) and (iii) all

claims by creditors or beneficiaries against the representative, in respect of any failure to administer the estate properly.^(c)

- (a) *Dowse v. Gorton* [1891] A. C. 190.
Hodges v. Hodges [1899] 1 Ir. Rep. 480.
Re Oxley [1914] 1 Ch. 604.

[The last case shows that mere standing by is not an implied consent by creditors for this purpose.]

- (b) *Ex parte Garland* (1804) 10 Ves., at p. 120.
- (c) *Re Johnson* (1880) 15 Ch. D., at pp. 552-553.

[The fact that one of several representatives is in default will not prejudice the claim to indemnity of the other or others not in default (*Re Frith* [1902] 1 Ch. 342).]

2216. When the representative has a right of indemnity under §§ 2213 and 2214, his creditors in respect of the transactions which give rise to the indemnity may stand in his place, and enforce their claims against the assets to the extent to which the representative is entitled to be indemnified.

Subrogation of creditors

- Re Johnson* (1880) 15 Ch. D. 548.
- Re Raybould* [1900] 1 Ch. 199.

[A representative who trades with the assets without authority is of course guilty of a breach of trust. Any profit which he makes belongs to the estate (*Vyse v. Foster* (1874) L. R. 7 H. L., at p. 329); and the creditors of the testator have a claim to be paid out of the assets prior to that of the creditors of the representative (*Re Millard* (1895) 72 L. T. 823; *Re Oxley*, *ubi sup.*). If, however, the creditors of the testator have expressly assented to this breach of trust, they are regarded as the principals of the representative, and, as such, are obliged to indemnify him (*Dowse v. Gorton*, *ubi sup.*, at p. 208, *per* Lord Macnaghten; *Re Millard*, *ubi sup.*, at p. 827, *per* Lord Esher, *diss.*).]

*Promise
by repre-
sentative*

2217. The representative may by his own promise render himself personally liable to satisfy any of the liabilities to which the estate of the deceased is subject. Such a promise must satisfy all the requirements of a valid contract;^(a) and it is not enforceable unless it also complies with the provisions of Bk. II, Part I, Sect. I, Tit. II, § 220.^(b)

(a) *Rann v. Hughes* (1778) 7 T. R. 350.

(b) Statute of Frauds (1677) s. 4.

[But such a promise, if made by one who is not yet a representative, need not comply with the provisions of the statute (*Tomlinson v. Gill* (1756) Amb. 330).]

*Personal
liability on
admission
of assets*

2218. The representative is personally liable, irrespective of assets, to pay any debt in respect of which judgment *de bonis testatoris* has been recovered against him;^(a) and to pay debts or legacies if by his words^(b) or conduct^(c) he admits that he has received assets sufficient to pay them. An admission cannot be withdrawn unless it is clearly proved to have been made by mistake;^(d) but if, after an admission, new facts as to the financial condition of the estate come to light, the admission made in ignorance of those facts is not binding.^(e)

(a) *Re Marvin* [1905] 2 Ch. 490.

[Failure to plead *plene administravit* is, in fact, treated as an admission of assets.]

(b) *Rothwell v. Rothwell* (1825) 2 S. & St., at p. 218, *per* Leach, V. C. E.

Barnard v. Pumfrett (1841) 5 My. & Cr. 63.

PERSONAL RIGHTS AND LIABILITIES 1419

- (c) *Corporation of Clergy v. Swainson* (1747) 1 Ves. Sen. 75 (payment of interest on legacies).

Barnard v. Pumfrett, *ubi sup.* (part payment of legacies).

Re Brogden (1888) 38 Ch. D., at p. 569, *per* Cotton, L. J. (payment of interest on legacies).

[An admission by the representative that he has assets for the payment of a debt of a lower degree was formerly an admission that he had assets for the payment of a debt of a higher degree (*Payne v. Little* (1856) 22 Beav., at p. 70); but, since the passing of the Administration of Estates Act, 1869, this rule has diminished in importance. If a legatee has recovered judgment against a representative *de bonis propriis* on an admission of assets, and the judgment has been satisfied, a creditor can follow the assets paid over to the legatee, provided that the legatee has in fact been paid from the assets, and not from the property of the representative (*Re Brogden* (1888) 38 Ch. D., at p. 569, *per* Cotton, L. J.).]

- (d) *Drewry v. Thacker* (1819) 3 Swans., at p. 548, *per* Lord Eldon, L. C.

- (e) *Horsley v. Chaloner* (1750) 2 Ves. Sen., at p. 85, *per* Strange, M. R.
Payne v. Little (1856) 22 Beav. 69.

2219. Payment of one debt is, *primâ facie*, an admission that the assets are sufficient to pay all debts of a superior degree;^(a) and payment of one pecuniary legacy is, *primâ facie*, an admission that the assets are sufficient to pay all pecuniary legacies.^(b) But the circumstances under which such payments were made may negative this rule.^(c)

*Payment
an admis-
sion of assets*

- (a) *Cadbury v. Smith* (1869) L. R. 9 Eq., at pp. 41-42.

[It is, of course, no admission of assets to pay other debts of equal degree; because the representative has a right to prefer one debt to another of equal degree (*ante*, Tit. V, § 2165).]

- (b) *Cook v. Martyn* (1737) 2 Atk., at p. 3, *per* Lord Hardwicke, C.

[*Semble*, the inference would not arise from payment of a preferred legacy (*ante*, Sect. I, Tit. IV, § 2002).]

- (c) *Postlethwaite v. Mounsey* (1842) 6 Ha. 33 n.
Cadbury v. Smith (1869) L. R. 9 Eq. 37.

Devastavit **2220.** A representative is personally liable, irrespective of assets, to the party damaged to make good the loss if:—

- (i) he breaks any of the rules as to the conduct of the administration of the estate;

Norman v. Baldry (1834) 6 Sim. 621 (payment to a legatee, a debt being outstanding).

Midgley v. Midgley [1893] 3 Ch. 282 (payment of a claim which was not enforceable).

Re Stevens [1898] 1 Ch., at pp. 168–9, *per* Lindley, M. R.

- (ii) a loss is caused to the estate either by his misfeasance or by the neglect of his duties;

Hall v. Hallet (1784) 1 Cox, C. C. 134 (allowing interest-bearing debts to run on when he had in hand enough to pay them).

Tebbs v. Carpenter (1816) 1 Madd. 290 (neglect to recover arrears of rent).

[Delay in taking out probate does not amount to a *devastavit* (*Re Stevens*, *ubi sup.*).]

- (iii) having got possession of the assets, he loses them by his wilful default.

Job v. Job (1877) 6 Ch. D. 562.

[At common law, the representative was absolutely responsible for any assets which came to his hands. But this was never the rule in equity; and the equitable rule now prevails in all Courts (*Job v. Job*, *ubi sup.*). The remedy of the injured party is either

an action for administration and an account, or a personal action against the representative alleging a *devastavit* (*Re Stevens, ubi sup.*).]

2221. An action for damages in respect of a *devastavit* against a personal representative is barred at the expiry of six years from the happening of the act or default alleged as the cause of action;^(a) and, in an action against a personal representative to recover money honestly but mistakenly paid away by him as such representative, the defendant can plead the provisions of the Trustee Act, 1888, s. 8 (1) (b), whether the action is by a creditor or by a beneficiary, and whether it is in form an action to recover money or an action for administration.^(b)

- (a) *Thorne v. Kerr* (1855) 2 K. & J. 54.
Lacons v. Warmoll [1907] 2 K. B. 350.
 (b) *Re Blow* [1914] 1 Ch. 233.

[For particulars of the statutory provision, see *ante*, Bk. III, Sect. XVII, Tit. VI, § 1823.]

;

2222. A creditor who has obtained a personal order against a representative for payment *de bonis propriis* of a debt due from the deceased, cannot enforce it by an order for attachment of the representative, as a person acting in a fiduciary capacity in default under an order by a Court of Equity, under the provisions of Section 4 of the Debtors Act, 1869.

Re Thomas [1912] 2 Ch. 348.

*Barred
after six
years*

*No attach-
ment on
personal
order*

[In respect of moneys ordered to be paid by the representative out of the deceased's assets which have come to his hands, the representative is in the position of a trustee, and can, therefore, be attached for disobedience to the order (Debtors Act, 1869, s. 4 (3); *Re Thomas, ubi sup.*). And, presumably, if the plaintiff can show means, the representative can, in other cases, be committed to prison for a limited period under the provisions of s. 5 of the Act.]

*No liability
for co-rep-
resentative*

2223. One representative cannot be made personally liable for the acts or defaults of a co-representative;

Trustee Act, 1893, ss. 24, 50.

Hargthorpe v. Milforth (1594) Cro. Eliz. 318.

Dix v. Burford (1854) 19 Beav., at p. 412.

unless:—

- (i) he unnecessarily does an act by which his co-representative gets sole control of any of the assets; or

Skipbrook v. Hinchinbrook (1805) 11 Ves. 252.

Clough v. Bond (1838) 3 My. & Cr. 490.

Re Gasquoine [1894] 1 Ch. 470.

- (ii) he negligently acquiesces in, or facilitates, a breach of duty by the co-representative.

Booth v. Booth (1838) 1 Beav. 125.

Styles v. Guy (1849) 1 M. & G. 422.

[*Semble*, there should, on principle, be a right of contribution among co-representatives who have become liable through a joint fault (*Dering v. E. of Winchelsea* (1787) 1 Cox, Eq. Cas., at p. 321, *per* Eyre, C. B.; *Robinson v. Harkin* [1896] 2 Ch. 415).]

INDEX

- Abeyance of seisin. *See* "Seisin, abeyance of."
- Abstract of title,
 delivery of complete, 191
 must be delivered by vendor to purchaser, 193
- Access to land, right of comprised by implication in sale, 187
- Acceptance
 of goods
 by conduct, 172
 by intimation, 172
 by retention without intimation, 172
 delivered otherwise than in accordance with contract, 169
 duty of buyer as to, 167
 examination by buyer prior to, 172
 when takes place, 172
 of offer. *See* "Offer and acceptance."
- Accident. *See* "Fatal Accidents Act, 1846"; "Workmen's Compensation Act."
- Accord and satisfaction,
 discharge of rights of action by, 150—151
 where accord without satisfaction, 151
 liability for tort, discharge of by, 368, 368 *n.*
 payment in satisfaction, 151
 pro tanto, 152
- Account
 as remedy of person injured by tort, 369
 claim for, alternative to claim for damages in respect of same tort, 378 *n.*
 current, appropriation of payments in, 114
 deductions allowed to agent on, 234, 234 *n.*
 in lieu of damages for infringement of patent, registered trade mark or copy-right, 426
 liability of joint tenants for, in respect of excess received as share or profits of land, 320
 of interest of partner in partnership business, 276
 of partnership affairs, right of partner to, 279
 on dissolution of partnership, 281, 288
 order for, when granted, 378
 partner receiving benefit,
 duty of, to, 279
 from competing business, duty of, to, 279
- Account stated
 as evidence of liability, how rebutted, 322 *n.*
 effect of, when mutual dealings between parties, 322
 in respect of money lent, interest on, 118
 treated as evidence of promise by party rendering to pay whole sum and each item in, 321, 322
 with minors void, 21

INDEX

- Accretion of soil, effect on boundaries, 778
- Accumulation, rules against
 - Act of 1800... 1080
 - Act of 1892 (for purchase of land), 1082
 - effect of violation, 1081
 - equitable interests, apply to, 751 *n.*
 - provisions not within, 1081—2
- Acquiescence, injunction refused on ground of, 377
- Act,
 - amounting to tort, appreciable damage in fact must be caused by, 326
 - evincing intention to renounce, contract discharged by, 147
 - imposing liability done at request of, and on behalf of, another, indemnity for, 324
 - malicious, when amounting to tort, 335
 - may be both breach of contract and tort, 336
 - more than one tort committed by, 373
 - of ownership, what amounts to, 415, 416
 - overt, assault committed by, 431
 - physical harm caused by intentional or negligent, liability in damages for, 445
 - prima facie* evidence of negligence, may be justified by proof of its being done in obedience to more pressing duty, 335
 - time for, expiring on holiday, 68
 - voluntary, for another, indemnity for, 317
 - wrongful, death of person caused by, right of personal representatives to sue party liable for, 362, 363
- Act of God, escape of dangerous substances brought on land, due to, 405, 406
- Act of Parliament, from what date operative, 68
- Action. *See also* "Limitation of Action."
 - against married woman for torts committed before or during marriage, maintainable without joinder of husband, 348
 - against personal representatives,
 - for wrongful appropriation of chattels personal by deceased, 364
 - for tort committed by deceased, when maintainable, 364, 365
 - against public authorities, subject to rule of limitation, 345
 - against board of guardians by pauper for injury suffered in course of work not maintainable, 343, 344
 - against co-tort-feasors barred,
 - by judgment obtained against one, 336
 - release of one, 336
 - against trade union, in respect of tortious acts committed by or on behalf of, not maintainable, 344
 - based on Fatal Accidents Act, common employment no defence to, 448 *n.*
 - brought for act done or neglect in pursuance or execution of Act of Parliament or public duty or authority, subject to rule of limitation, 345
 - by agent in own name not generally maintainable, 65—66
 - by bailee against third persons, 409 *n.*
 - by bailor, on contract of bailment when goods in possession of bailee lost or stolen, 420
 - by corporation
 - for torts affecting business or property, maintainable, 346
 - for torts affecting personal reputation of members, not maintainable, 346
 - by creditor
 - against surety, cost of defending, 32
 - joinder by surety in, of person liable for indemnity in contribution, 302
 - by or against person not party to contract, 104

INDEX

Action—*contd.*

- by personal representatives,
 - for trespasses committed during lifetime of deceased, 410 *n.*
 - for wrongful act, neglect or default, causing death of deceased, 362, 363
 - must be for benefit of wife, husband, parent and child of deceased person, 363
 - of deceased, for damages suffered from death of deceased, time for, 363
 - on torts committed against deceased, 362—363
- by joint promisees, parties to, 157, 157 *n.*
- by reversioner for permanent injury to reversionary interest, 426
- by surety
 - in name of creditor, 296
 - against principal debtor, parties to, 295 *n.*
- by workman to recover statutory compensation, when maintainable, 459
- by wife for protection and security of separate property, 348, 349
- cause of, a continuing injury, 372, 372 *n.*
- concerning contracts or equities affecting lands situate abroad, entertained by courts of equity, 339 *n.*
- discharge of rights of,
 - by release, 150
 - by accord and satisfaction, 150—151
 - by payment in satisfaction, 151
- for battery,
 - barred by summary process, when, 438
 - defences to, 433, 434, 435, 436
 - when maintainable, 432
- for breach of statutory duty, when maintainable by individual, 328, 445
- for infringement
 - of patent, registered trade mark or copyright, 426
 - of public right, when maintainable by individual, 327, 328
- for mental shock, 454
- for payment of money due under statute, valid custom, or official duty, 323, 324
- for pecuniary damages, by person injured by tort, 369
- for physical harm caused by, 454
- for recovery of land, not defeated by want of legal estate, 388 *n.*
- for slander of goods,
 - survival of, to personal representative, 428
 - action for damages and injunction in, 428
- for tort
 - affecting land situate out of England, not maintainable in England, 339
 - affecting person or movables committed out of England, when maintainable in England, 339
 - against ambassador, public minister or suite, when maintainable, 341
 - against coroner for acts done in course of judicial duties not maintainable, 342 *n.*
 - against colonial governor,
 - defences to, 341
 - may be brought in English or Colonial courts, 341
 - against judges for acts done in judicial capacity not maintainable, 342
 - against magistrate for act done in course of judicial duties not maintainable, 342 *n.*
 - amount of damages in, a question of fact, 369
 - assignment of, 365
 - by liquidator of company, 365
 - by trustee in bankruptcy, 365

INDEX

Action—*contd.*

- for tort—*contd.*
 - barred by lapse of time, 368
 - by alien or foreign State, not maintainable in England in respect of act authorised by British Crown, 340
 - by co-owner against stranger in respect of common property without joinder of other co-owners, 349
 - damages in, estimate of, 371
 - damages claimable in fresh, 373
 - fresh cause of, arising on fresh loss, 373
 - not maintainable between husband and wife, 348, 349
 - of Crown not maintainable, 340
 - of public official in private capacity maintainable, 340
 - of public officials or subordinates in representative capacity not maintainable, 340
 - of subordinate of public official when maintainable against public official, 340
 - personal to bankrupt, right of, does not pass to trustee, 367
 - plea of infancy no defence to, when minor wrongfully detaining goods under contract, 347
 - when tortious act of minor indirectly connected with contract, 347
 - right of, released under seal, without consideration, 368
 - to property, right of bankrupt as to, passes to trustee in bankruptcy, 367
- for use and occupation, not maintainable by owner of land wrongfully occupied, 319
- foreign corporations may bring or defend, 7, 8
- founded on negligence, what plaintiff must show in, 329
- in nature of ejectment, co-owner may recover possession and mesne profits by, 388, 389
- interest may be recovered by, with or without principal debt, 116
- Irish corporations not liable to, in England, 8
- limitation of. *See* "Limitation of action."
- loss arising from single tort, including prospective loss, must be recovered in same action, 372, 373
- new trial of, when ordered, 371, 372
- not maintainable,
 - County Court judgment, on, 323, 323 *n.*
 - for money paid on wager, 312
 - on gaming or wagering contract, 309
- of assault, 431
 - defences to, 433, 434, 435, 436
- of case for nuisance, 391 *n.*
- of detinue,
 - by occupier of land for chattels found on, 424
 - history of, 422 *n.*
 - nature of, 422 *n.*
 - parting with possession no defence to, 424, 425
 - joinder of co-owners in, 349 *n.*
 - jus tertii* as defence to, 425
 - sufficiency of plaintiff's title in, 423
 - unlawful refusal to give up goods of another renders person liable to, 422
- of ejectment
 - against mere trespasser, possession sufficient to support, 390
 - against person withholding possession, right to, 388
 - by person entitled to *interesse termini*, 388 *n.*

INDEX

Action—*contd.*

- of ejectment—*contd.*
 - damages for dispossession in, 388
 - defences to, 389
 - history of, 388 *n.*
 - jus tertii* as defence to, 389
 - onus probandi* in, 389
- of false imprisonment, when maintainable, 439
- of libel or slander not maintainable against counsel, witnesses or parties for words written or spoken in course of judicial proceedings, 342
- of nuisance,
 - by occupier of land affected, 395
 - by reversioner, when maintainable, 395
 - defences to, invalid, what are, 394
 - grounds for, 392, 404 *n.*
 - not barred if act giving rise to amounts to trespass, 391
 - not maintainable, when, 393
- of replevin for wrongful seizure of goods, 413
- of trespass to goods,
 - by assignee, when maintainable, 410 *n.*
 - by bailor against bailee, 409
 - by bailor against third persons, 409
 - by executor and administrator, when maintainable, 410
 - by finder against person without title, 411
 - defence to, 411
 - by master when goods left in custody of servant, 408
 - measure of damages in, when plaintiff deprived of goods, 412
 - plaintiff must prove actual possession at time of interference, 407, 408
- of trespass to land,
 - defences to, 387
 - jus tertii* as defence to, 384
 - measure of damages in, 413
 - when maintainable by co-owners of land against each other, 387
- of trover,
 - against bailee for goods lost or stolen, when maintainable, 420
 - against purchaser of goods in market overt, 420 *n.*
 - against mere wrong-doer, *jus tertii* no defence to, 420
 - as remedy for conversion of goods, 414, 414 *n.*
 - bona fides* no defence to, 418
 - by bailor or bailee, when maintainable, 417
 - by bailee against bailor, when maintainable, 414 *n.*
 - by bailor against bailee, *jus tertii* no defence to, 420, 421
 - by co-owners of chattels against each other, when maintainable, 418
 - by finder of chattel, 417
 - by person whose goods have been distrained for rent, 414 *n.*
 - history of, 415 *n.*
 - joinder of co-owners in, 349 *n.*
 - jus tertii* when defence to, 420, 421
 - mere wrong-doer divested of possession cannot maintain, 418
 - plaintiff relying on demand and refusal in, what must be proved by, 419 *n.*
 - title relating back to date of conversion sufficient to maintain, 417
- on contract, party knowing impossibility of performance cannot maintain, 129
- on judgment, 322
 - obtained in High Court not maintainable in County Court, 323

INDEX

Action—*contd.*

- on foreign judgment, 322, 323
 - defences to, 322, 323
- price of goods sold recoverable by,
 - on refusal or neglect of buyer to pay, 180
 - when time of payment independent of delivery, 180
- proper remedy for trespass by domestic animals, 361
- quia timet*, to restrain commission of apprehended tort, 374
- rent recoverable by, limited to six years' arrears, 80
- right of,
 - against bankrupt, 149
 - transfer of, for unliquidated damages, 141
- Scottish corporations not liable to, in England, 8
- seduction, for,
 - by whom maintainable, 464
 - development of, 464 *n.*
 - essential elements in, 465
- separate rights of, where one act committing two or more torts, 373
- severance of, when single cause of, causes personal and proprietary damage, 367 *n.*
- tithe rent-charge not recovered by, 80 *n.*
- to recover money paid on wager not maintainable, 312
- under Employers' Liability Act, 1880, limitation of, 453
- "Active military service," definition of, in relation to wills, 1243 *n.*

Ademption,

- non-portions legacies, of, 1284
- presumption of, evidence to rebut, 1284, 1285
- revocation of legacy by, 1263, 1264

Administration (of assets),

- Chancery Division, by, 1387
- claims in, order of, 1336—1339
- Crown debts,
 - priority of, 1377
 - surety paying, 1377 *n.*
- cum testamento annexo*, 1339
- discretion of Court, 1340
- future and contingent liabilities in relation to, 1378
- grant of,
 - by the Court, 1336
 - revocation of, 1350
- husband's right to, of wife's estate, 1315
- insolvent estates, 1387
- letters of,
 - conditions of grant of, 1336 *n.*
 - executor *de son tort* not compelled to take out, 1345
- limited grants of, 1341 *n.*
- marshalling of assets in, 1398—1401
- order of claim, 1340
- personal representative's right of preference, 1378, 1379
- priority of debts against assets, 1372—1377
- property of convict, under Forfeiture Act, 1870..20, 21, 21 *n.*
- revocation of, validity of acts before, 1351
- right of retainer, exercise of, after order for, 1380
- Statutes of Limitation and, 1383, 1386
- statutory debts, priority of, 1377

Administrator,

- bankrupt as, 1341

INDEX

Administrator—*contd.*

- capacity to act as, 1341
- de bonis non administratis*, 1335
 - guiding principles of appointment, 1340
- definition of, 1329
- minor as, 1341
- judicial trustee as, 1342
- office of, not assignable, 1335
- promise by, to answer damages out of own estate must be in writing, 97—98
- Public Trustee as, 1336, 1338
- retainer, right of, 1379
- title of, 1346
 - between death and grant of administration, 1346
 - relation back of, 1347
 - purposes for, 1347, 1348
 - when not applicable, 1348
 - when it vests, 1348, 1349
- trespass to goods of deceased, action for, when maintainable by, 410

Adultery,

- condonation of, a bar to divorce, 1190
- connivance at, a bar to divorce, 1189
- damages for, 1202, 1203
 - grounds for refusal of, 1203
- divorce in relation to, 1187—1191
- dower, effect on, 1323
- imprisonment of wife by husband, to prevent commission of, 437 *n.*
- incestuous,
 - definition of, 1188
 - wife's ground for divorce, 1187
- judicial separation
 - barred by, of petitioner, 1194
 - granted for, 1193
 - petitioner conducting to, bar to judicial separation, 1195

Advances by partner beyond amount of capital subscribed, interest on, 277

Adverse possession,

- abandonment of, 767
- advowson, of, 845
- Crown, against, 847
- definition, of, 765
- disabilities and, 841, 844
- effect of, 842
- effective, must be, 766
- lessee, against, effect of, 765
- lessee, not by against lessor, 765
- liabilities of, 766
- mesne profits and, 767
- mortgagees, and, 846
- mortgagors, and, 846
- spiritual corporation, against, 844
- statutory title by, 841
- tenant at will, and, 765
- title by, now forced on a purchaser, 841 *n.*
- transference of, 767
- trustee may not plead against beneficiaries, 841

Advowson,

- adverse possession of, 845

INDEX

Advowson—*contd.*

- "appurtenance" not, 727
- Catholic, of, 729
- collative, nature of, 724
- debts, liable for, 725
- definition, 724
- donative, abolished, 724
- equitable owner presents, 735
- Jew, of, 729
- lapse of,
 - to archbishop, 730
 - to Crown, on promotion, 728
 - to Crown, on vacancy, 730
 - to Ordinary, 730
- next presentation, sale of, forbidden, 725, 726
- period of limitation of action, in relation to, 79
- presentation of himself by patron, 728
- presentative, nature of, 724
- purchase by clerk, 728
- resignation bonds, 726
- sale of, restrictions on, 725, 726
- tenure of, 671
- title to, extinguished on expiry of period of limitation of action, 80
- trustee in bankruptcy, does not pass to, 857
- vacant, cannot be transferred, 727

Affiliation order, application for, 1213 *n.*

Age of discretion, 441 *n.*

Agency,

- contract of,
 - defined, 228
 - form of, 228 *n.*
- created by power of attorney. *See* "Power of attorney."
- determination of contract of,
 - by bankruptcy of agent, 238, 239
 - by bankruptcy of principal, 238, 239
 - by death of either party, 238
 - by insanity of either party, 238
- estoppel by, 233

Agent,

- accounts between principal and, altered owing to conduct of creditor, effect of, 63
- acknowledgment by carrier that goods held as, under transit, 176
- acting as principal by consent, rights of third parties against, 64
- acting by deputy, when permissible, 230
- actions by,
 - what defences available, 66
 - in own name on contracts entered into as agent, when maintainable, 65
- allowances and disbursements by, deduction of in accounting for money received, 234, 234 *n.*
- any person of sound mind may act as, 52
- apparently acting as principal, liability of true principal, 62
- appointment of,
 - by corporations aggregate,
 - under common seal, 53
 - by conduct, 53 *n.*
 - by minor, 27 *n.*

INDEX

Agent—*contd.*

- appointment by deed, when essential, 53
- authorised to sell on credit, not answerable for solvency of partner, 235, 236
- authority of,
 - acted on, when irrevocable, 240, 241
 - coupled with interest,
 - effect of death or insanity of principal on, 240 *n.*
 - irrevocable, 240
 - extent of, 229
 - joint,
 - exercise of, 228, 229
 - when, 228, 229
 - and several, exercise of, 228, 229
 - partially executed, revocable as regards future transactions, 241
 - to complete transaction by doing formal act not revoked by bankruptcy of principal, 239 *n.*
- bankruptcy of, whether contract of agency determined by, 238, 239
- bribe accepted by, liability for damages for loss sustained by principal, 235
- child acting as, liability of parent for, 58 *n.*
- child is not to pledge parents' credit, 57
- commission due to, 236
 - forfeited when, 236
 - payable on completion of undertaking, 236, 237
- commission paid to, recovery of, by principal, 236
- credit to, given by third party after discovery of undisclosed principal, effect of, 63
- death of, contract of agency determined by, 238
- defined, 52
- del credere*, 61, 62, 236
 - appointment of, not a contract of guarantee, 236 *n.*
- delegation of authority by, 230
- duty of,
 - to act with strictest good faith towards principal, 231
 - to carry out instructions of principal, 229, 230
 - to disclose all material facts, 231
 - to act in person, 230
 - to act for inclusive benefit of principal, 231
 - to exercise reasonable care, diligence and skill, 230
 - to keep property of principal distinct, 233
 - to pay over any balance due to principal, on demand, 233
 - to produce documents for inspection, 233
 - to render clear accounts, 233
- effecting insurance as broker with authority of principal, action by, 65
- entering into contract to which principal not a party, action by, 65
- entering into contract on behalf of foreign principal, action by, 66
- evidence admissible to prove existence of agency, 62
- existence and extent of agency, how determined, 52
- fiduciary character of, 232, 233
- foreign principal, liability of, on contracts made by, in England, 63
- general, 229
 - "general" defined, 55
 - liability of principal to third parties for acts of, 55
 - "special" defined, 55
 - who are : partner is, for partnership, factor for employer, broker for employer, shipmaster for employer, 55
 - who are : wife living with husband is for husband in respect of necessaries, 56

INDEX

Agent—*contd.*

- general lien, none, 433
- goods in possession of unpaid seller as, lien of, *qn*, 175
- gratuitous, exercise of skill by, 230 *n.*
- housekeeper or servant is, to pledge credit of master, 57
- indemnification of, by principal, 237
 - for unlawful acts done at instance of, 237
 - on improper revocation of authority, 241 *n.*
- interest chargeable on balance due by, on refusal to pay, 233
- judgment against, recovery of, bars action against principal, 64
- legal capacity determines right and liabilities of, 52
- legal relations with principal governed by law of contract, 52
- liability of,
 - for sub-agent, 231
 - principal for acts of,
 - governed by extent of authority conferred, 59
 - to third parties,
 - with notice of authority, 57
 - without notice of authority, 57.
 - to third parties for sums improperly obtained, 234
 - to third parties on contract, 60—61
- lien of,
 - extension of, by custom or agreement, 238
 - on movables of principal, in respect of expenses and commission, 237, 238
- master of ship chartered by buyer, whether goods in possession of as carrier or, 177
- materials or information obtained by, in course of employment, may not be used against principal, 234
- may be "seller" of goods, 174
- mens rea* as affecting relation of principal and, 64
- minor may act as, 24
- money received by, on wager, recoverable by principal, 312
- of buyer,
 - may end transit by taking delivery from carrier or bailee, 176
 - obtaining possession of goods, loss of lien of unpaid seller or, 175, 176
- onus of proving disclosure by, 232
- partner is, for firm, 268
- performance of contract by, 110
- person acting on own behalf cannot claim afterwards to be, 53, 54
 - effect of subsequent adoption of acts of, 53, 54
- personal liability of,
 - by particular custom when acting for unnamed principal, 61
 - on acceptance of bill in own name, 61
 - when acting for foreign principal, 61
 - when deed executed in own name, 61
 - when pretending to act, without authority, 61
- position of third parties dealing with, when agency determined by death or insanity, 238 *n.*
- possessing special property in subject-matter of contract, action by, 65
- power of attorney. *See* "Power of attorney."
- principal describing himself as, action by, 64 *n.*
- profits accruing to, principal entitled to, 234, 235
- profits by, in sole employ, outside course of employment, principal entitled to, 235
- reimbursement and indemnity payable to, on revocation of authority partly executed, 241

INDEX

Agent—*contd.*

- relationship with principal created by
 - conduct, 53
 - offer and acceptance, 54 *n.*
 - ratification, 53
- remuneration of, 236
 - according to profits, partnership not implied from, 264
- revocation of authority of,
 - as regards third parties, 59
 - effect on responsibility of principles, 59, 60
 - by principal, 240
 - date of, on bankruptcy of principal, 239
 - rights of third parties without notice, 59—60
- rights and liabilities of, as against third parties, 243
- rights and liabilities of, determined by legal capacity, 52
- secret commission or bribe received by, principal entitled to, 234, 235
- secret profit by, 232
 - recovery of commission paid in ignorance of, by principal, 232 *n.*
 - repudiation of, by principal of transactions involving, 232
- special agent, responsibility of employer to third parties for acts and defaults of, 59
- title of principal may not be disputed by, 233
- torts of, authorised or ratified by principal, liability for, 350
- torts by, personal liability of, 62
- treated as principal after notice, action by, 65
- ultra vires* loan to, applied in discharge of lawful debts of principal, 317, 318
- undisclosed principal of,
 - action by, 64
 - rights of, on contracts made by, 62, 63, 64
- without consideration, person undertaking to act as, 228
- obligations of, 228

Agreement,

- discharge of contract by subsequent, 144, 145
 - substituting new contract, 144, 145
- discharge of contract by, where one party has performed, 145
- lien of agent extended by, 238
- oral, discharge of contract by, 145

Agricultural holdings, enforcement of claim to compensation by plaintiff, 360 *n.*

- limitation of distraint by landlord of, 80—81

Air,

- right of, recognised as easement, 711 *n.*
- space incumbent on land, interference with possession of, action of trespass for, 381

Alien,

- act of State, and, 340
- British ship, cannot own share in, 30, 974
- cannot be appointed "protector of a settlement" in England, 30
- legal incapacity of, 2
- title to land cannot be acquired by events before 1870..31
- will of, 1243 *n.*

Alien enemy,

- acquisition of property by unilateral conveyance, 20 *n.*, 31
- goods of, how acquired, 936
- legal incapacity of, 20, 31
- rights suspended, not destroyed, by outbreak of war, 20 *n.*, 31

INDEX

- Alienation,
 - chose in action of, within Act of 1571..1058 *n.*
 - fraudulent,
 - an act of bankruptcy, 1066
 - delay no bar to setting aside, 1064
 - how set aside, 1062
 - notice of, 1063, 1064
 - onus of proof, 1061
 - subrogation of rights, 1063
 - under Act of 1571, valid except against creditors, 1063
 - what is, under Act of 1571..1059, 1060
 - who may sue, 1062
 - "good consideration," what is, 1059 *n.*
 - ineffectual against creditors, under Act of 1571..1058, 1059 *n.*
 - restraint on. *See* "Restraint on alienation."
 - voluntary,
 - not necessarily fraudulent, 1061
 - when deemed fraudulent, 1060, 1061
- Alimony,
 - amount of, 1201
 - domicile in relation to application for, 1204
 - variation of amount of, payable, 1201
- Allowances, agent may deduct in accounting for money received to use of principal, 234, 234 *n.*
- Alteration,
 - material, of written instrument, discharge of contract by, 149
 - of written document by mistake, 149
- Alternative,
 - impossibility of performance of one of two after choice made, 131, 132
- Ambassador of foreign State, action of tort against, when maintainable, 341
- Animals. *See also* "Dog."
 - carriage of, limitation of liability in respect of, by railway and canal companies, 256, 257
 - dangerous,
 - causing physical harm, liability of person keeping, to damages, 453
 - damage inflicted by, liability of person keeping, for, 360, 361
 - domestic,
 - doing damage of kind not usual to commit, when defendant liable for, 358, 359
 - liability of person keeping, for damage caused by trespass, 358
 - occupier's right to destroy, 770
 - on highway, trespassing on land adjoining, 358
 - trespass by,
 - destruction of, for, not justified, 361
 - remedies for, 361
 - hired, duty of feeding on hirer, 195
 - live, damage caused by negligence of defendant in case of, not presumed, 330
 - loss of or injury to in carriage,
 - damages recoverable for, from railway or canal company, 257, 258
 - onus of proof as to value, 258 *n.*
 - offspring of, belong to owner of mother, 197, 937
 - seizure of, for distress damage feasant, 84
 - valuable, increased charges for carriage by railway and canal company, 258
 - wild, damage done by, occupier of land when liable to neighbour for, 360
- Animals *feræ naturæ*,
 - capture of, 936
 - frightening away, not actionable, 770

INDEX

Animals *feræ naturæ*—*contd.*

- occupier's right to kill, 769
- rent, cannot be distrained for, 972 *n.*

Annuity,

- alienation of, when valid, 998
- apportioned between several funds, 995
- apportionment of, 997
- arrears of, only six years recoverable, 996
- corpus or income, charge on, 973
- definition, 991
- grantor, personal liability of, 992
- inheritable, nature of, 992
- land, charged on, tenant not personally liable, 993
- life, presumption of, 992
- no action against Crown for pension, 997
- option to capitalize, 994
- out of profits
 - of vendor of goodwill of business, 264
 - to widow or child of deceased partner, 264
- personal estate, 991
- personal, no limit to arrears recoverable, 996
- policy, amount recoverable under, 306
- recovery of, 993
- registration of, 992
- rent-charge and, 992
- satisfaction of, entry of, 992
- time limit for recovery of, 996

Antient demesne,

- Statute of Uses and, 589
- tenants in, 607 *n.*

Apparent ownership, bill of sale, and, 953

Appendant. *See* "Appointment, powers of"; "Incorporeal hereditaments"; "Powers."

Appointment,

- powers of,
 - appendant, 866
 - collateral, definition, 866
 - common law, 867 *n.*
 - default of exercise of, effect, 875
 - defective exercise, 870
 - disclaimer of, 871
 - effect of exercise by will, 869
 - election by persons taking in default, 876
 - equitable, 867 *n.*
 - excessive exercise of, 876
 - exercise by deed, 868
 - exercise by general devise or bequest, 869
 - exercise by will, 868
 - exercise in derogation of earlier exercise, 873
 - form of exercise, 868
 - fraud upon, 871
 - general, 869
 - general and special, 867
 - gross, in, 866
 - illusory exercise of, 874
 - perpetuities, and, 877
 - special, perpetuity in, 874

INDEX

- Appointment—*contd.*
 powers of—*contd.*
 survival of, 872
 uses, by, 867 *n.*
 testamentary, form of, 1241
- Apportionment,
 of interest between persons successively entitled to fund, 116
 of payments made generally on account, 114
- Apprentice,
 chastisement of, assault or battery justified if committed by way of, 436
 compensation for work by, recoverable by master from third person, 217 *n.*
 death of,
 determines contract of apprenticeship, 218
 premium not returnable on, 218
 deprivation of services of. *See* "Services, action for deprivation of."
 duty of, to act faithfully towards and obey master, 217
 duty of master,
 to employ, 217
 to teach trade or business to which apprenticed, 217
 earnings of, right of master to, 217
 infant may contract to become, 217
 living with master, right of, to food and medical attendance, 217
 misconduct of, determination of apprenticeship by, 219
 not entitled to wages, 218
 parish, 220
 to the sea or sea-fishing service, 220
- Apprenticeship,
 contract of,
 defined, 216
 determinable by death of either party, 218
 extending beyond one year, must be in writing, 216
 parties not released by refusal of infant to serve, 217
 usual form of, 216 *n.*
 whether determinable on misconduct of apprentice, 219
 discharge of indentures or articles of agreement of, on bankruptcy of master,
 218
 person entering into contract of, is a "workman" under Workmen's Com-
 pensation Act, 457
 premium payable on, liability of infant for, 216, 217
 transfer of indentures of, on bankruptcy of master, 219
- Appropriation
 of payment,
 by creditor of several debts, 113
 by debtor owing distinct debts to one person, 113
 by law, in discharge of debt, 114
 in current account, 114
 where separate account treated as one entire, 114
- Approval, sale on, when ownership passes, 945
- Approvement. *See* "Waste (manorial)."
- Appurtenant. *See* "Incorporeal hereditaments"; "Powers."
- Arrest,
 assault or battery to effect, lawful, justified, 437
 by bail, of person for whom bail gone, 441
 by constable or churchwarden of person guilty of brawling in church, 442 *n.*
 by military officer of person charged with offence against military discipline or
 under Army Act, 442

INDEX

Arrest—*contd.*

- for misdemeanour, when justified, 437 *n.*
- for past misdemeanour, without warrant, when justified, 437 *n.*
- for public disturbance, when justified, 437 *n.*
- malicious, action for, 335 *n.*
- on suspicion of felony,
 - by constable, 442
 - when justified, 441
- without warrant, by private persons, statutory powers of, 443, 444
- wrongful, committed by servant, whether master liable for, 353

Artificer, considered as "workman," 225, 449, 450

Assault,

- action of, 431
 - when barred by summary proceedings, 438
- claim for, barred by period of four years, 73
- committed in course of forcible entry to land, liability for, 383
- consent of plaintiff to, nature of, 432, 433
- damages for, special damages may be proved in aggravation of, 439
- defined, 431
- force used in justifiable case of,
 - must be no more than necessary, 436
 - resulting in wounding, not justified, 436
- justification for, also justification for imprisonment, 443
- justified
 - in defence of possession of land or chattels, 434, 435
 - in resisting illegal entry on land, 434
 - in self-defence, with reasonable force, 434
 - to effect a lawful arrest, 439
 - to eject person making disturbance in public place, 435
 - to eject trespasser, 435
 - to prevent continuance or repetition of breach of the peace, 437
 - to prevent felony, 437
 - to prevent unlawful seizure of chattels in defendant's possession, 435
 - to restrain dangerous lunatic, 438
 - to take chattels to possession of which defendant entitled, 436
 - when committed on child, ward, apprentice or pupil by way of moderate chastisement, 436
 - when consequences not foreseen, 433
- overt act, committing, 431
- special damage in action of,
 - may be proved in aggravation of damages, 439
 - need not be alleged or proved, 439

Assets,

- admission of,
 - by payment of debt on legacy, 1419
 - by personal representative, 1418, 1419
- creditor's right to follow, 1367, 1390
- definition of, 1369, 1370
- distribution of, by personal representative, after advertisement, 1390
 - in relation to insolvent estate, 1389
- equitable, 1373
 - priority of debts against, 1373
- incumbrances on, 1394
- legal,
 - order of payment of debts out of, 1375—1377
 - priority of debts against, 1372

INDEX

- Assets—*contd.***
 marshalling of, 1398—1401
 order in which applied to payment of debts, 1391—1393
 order of resort to, 1398—1401
 payment of debts out of deceased's, 1370—1374
 personal, 1370
 personal representative's liability limited by, 1369
 real, 1371
 realisation of, by personal representative, 1403
 sale or pledge of, by personal representative, 1407 *n.*
 scope of, 1370
- Assignee,**
 defences available to debtor against claim of, 142, 142 *n.*
 of goods, action in trespass by, when maintainable, 410 *n.*
 of share of partner,
 on dissolution of partnership, 281
 position of, 280
- Assignment**
 complete, as against debtor on notice, 142
 debtor without notice of, discharging liability to assignor, 142
 notice of, priorities of, 142
 of action in tort, 365
 by liquidator of company, 365
 by trustee in bankruptcy, 365
 of contract, personal, 141
 of duty arising out of contract, 143
 of negotiable instrument, 143
 of right to sue for unliquidated damages for past breaches, 141
 voluntary,
 liability in tort cannot be transferred by, 366
 right to receive damages for tort cannot be transferred by, 365
- Assistance, writ of, 379 *n.***
- Associations,**
 corporate or incorporate, 5
 number of component members, 5 *n.*
 under royal or statutory authority, privilege as to membership, 5 *n.*
- Assumpsit, quasi-contractual obligations enforced by, under old law, 316 *n.***
- "At sea," definition of, in relation to wills, 1243 *n.***
- Attachment**
 of wages, 226
 writ of, how obtained, 1144 *n.*
- Attendant term. *See* "Satisfied term."**
- Attestation, when essential in specialty contract, 96 *n.***
- Attorney. *See* "Power of attorney."**
- Attornment. *See also* "Reversion, alienation of."**
 to stranger, effect of, 549
- Auction,**
 sale of goods by,
 in lots, 182
 reservation of right of seller to bid at, 183
 subject to reserve price, 183
 when complete, 183
 sale of land by,
 reservation of right to bid, 192
 subject to reserved price, 192
 what must be stated in particulars or conditions of sale, 192

INDEX

Auction—*contd.*

sale of land by—*contd.*
without reserve, 192

Authority

of agent, 228

acted on, when irrevocable, 240

coupled with an interest, irrevocable, 240

delegation of, 230

determination of, 238, 239

extent of, 229

general, 229

joint, 228, 229

joint and several, 229

partially executed, revocable as regards future transactions, 241

revocation of, 238, 239, 240

of master, servant committing unlawful act in mistaken belief of, master not liable for, 352

of partner,

continuance of, during winding up, 284

determined by bankruptcy, 285

representation as to, 272

to act as agent of firm, 268, 269

to pledge credit of firm, 269

of schoolmaster to chastise, nature and extent of, 437 *n.*

show of, submitted to by plaintiff sufficient in action for false imprisonment, 439

statutory, as defence to action of tort, 344

Badges of fraud under Act of 1571..1059, 1060

Base fee,

creation of, 564

tenant of, has powers of tenant for life, 885

Bail, arrest by, of person for whom bail gone, when justified, 441

Bailee,

acknowledgment by carrier that goods held as, ends transit, 176

action of trover against, by bailor, *jus tertii* no defence to, 420, 421

action by, right of, not affected by bailor's ability to sue, 409 *n.*

breach of contract by, damages for, 122 *n.*

continuing in possession of goods rejected by buyer, transit not ended by, 177

delivery of goods

for transmission to, by unpaid seller, loss of lien by, 175

to, transit begun by, 176

delivery taken from by buyer or agent ends transit of goods, 176

determining bailment by breaking bulk, action of trespass against, by bailor, 409

duties and liabilities of buyers or sellers of goods as, 167, 168

goods in possession of unpaid seller as, lien of, on, 175

goods lost or stolen without connivance, action on contract of bailment for, by bailor, 420

larceny by, 409 *n.*

liability of, in trover, when goods lost or stolen without connivance of, 420

obtaining possession with deceit intending to misappropriate, guilty of larceny, 409 *n.*

stoppage of goods *in transitu* by unpaid seller giving notice of claim to, 177, 178

INDEX

- Bailee—*contd.***
 trover by,
 against bailor, when maintainable, 414 *n.*
 against third party, when maintainable, 417
 wrongfully refusing to deliver goods to buyer or agent, transit ended by, 177
- Bailiff**, joint tenants receiving more than share of profits or rent of lands liable for excess as, 319
- Bailor**,
 action on contract of bailment by, when goods lost or stolen without connivance of bailee, 420
 of goods,
 action by, for trespass against third persons, 409
 action of trespass by, against bailee, when maintainable, 409
 right of, to sue third persons for trespass, rights of bailee not affected by, 409 *n.*
 trover by, against third party, when maintainable, 417
- Bank**,
 deposit with, deemed to be on loan, 202
 lien of, on securities deposited with, 205
- Bank note**,
 specific goods for purposes of conversion, 414 *n.*
- tender of**
 Bank of England, 107—108 *n.*
 country, 107—108 *n.*
- Bankers**, lien of, 961, 962 *n.*
- Banking partnership**, number of partners in, 266
- Bankrupt**,
 acquisition of property by undischarged, 28
 advertisements of undischarged, whether vesting in trustees, 28
 contractual capacity of undischarged, 28
 dignities of undischarged, whether passing to trustee, 28
 discharge of, destroys creditor's right to sue, 149
 earnings of undischarged, right to retain as against trustee, 28
 goodwill of, sale of, 1031
 leaseholds of, purchase before intervention of trustee, 28
 leaseholds of undischarged, must be expressly claimed by trustee, 28
 limitation of distraint on tenant, 81
 limitation of life estate until a person becomes, 44, 45
 limitation of fee until a person becomes, 43
 married woman may be made, 29
 offices of undischarged, whether vesting in trustee, 28
 partner, estate of, not liable for debts contracted after date of bankruptcy, 284
 person may not be made, in respect of debt contracted during minority, 25
 provision for divesting interest of, 43
 realty acquired by undischarged, passes to trustee without express claim, 28
 right of, to recover damages for tort, when passing to trustee, 366
 rights of, claimed by trustee for benefit of creditors, 28
 tort to property of, right of, to sue for, passes to trustee in bankruptcy, 367
 tort personal to, right to sue on, does not pass to trustee, 367
 torts of, proof in bankruptcy for unliquidated damages in respect of, 367
 trustee, may be, 1106
 undischarged, legal incapacity of, 2, 28
- Bankruptcy**. *See also* "Insolvent estate."
 administration, effect on, 1341
 chattels personal, alienation by trustee in, 977

INDEX

Bankruptcy—*contd.*

- commencement of, what, 1068
 - discharge of contract by, 148, 149
 - disclaimer of chattels corporeal on, 970
 - employer, of, workman's rights in case of, 461
 - execution, effect on, 971 *n.*
 - executorship, effect on, 1331
 - money-lender, enforcement of claim by, 202
 - of agent, whether contract of agency determined by, 238, 239
 - of co-promisor, effect of, 156
 - of donor of power of attorney,
 - person acting in ignorance of, not liable, 241, 242
 - expressed to be irrevocable, 242, 243
 - of master,
 - apprenticeship determinable on, 218
 - contract of service not determined by, 215
 - of partner,
 - determination of authority by, 281
 - dissolution of partnership on, 281
 - liability for future debts determined by, 281
 - of principal,
 - authority of agent to do formal act not revoked by, 239 *n.*
 - contract of agency determined by, 238, 239
 - date of revocation of authority of agent, 239
 - of principal debtor,
 - proof by surety in, 301
 - surety not discharged by, 301
 - of tenant, proof by landlord for arrears of rent in, 81 *n.*
 - of wrong-doer, liability in tort not extinguished by 367
 - proof in,
 - of claim for unliquidated damages in respect of tort committed by bankrupt, 367
 - of claim for value of specific goods passing to trustee in bankruptcy, 367 *n.*
 - property not passing on, 969
 - property passing on, 969
 - receiving order in, suspends creditor's right to sue debtor, 149
 - rights of action in tort passing to trustee in, assignment of to stranger, 365
 - rules of, applied to insolvent estates, 1388, 1389
 - salary, preferential claims for, in, 226, 227
 - trustee in,
 - bankrupt's right to recover damages for tort, when passing to, 366
 - bankrupt's right to sue for tort personal does not pass to, 367
 - bankrupt's right to sue for tort to property passes to, 367
 - claim for value of specific goods passing to, proof in bankruptcy for, 367 *n.*
 - wages, preferential claims for, in, 226, 227
- Bankruptcy proceedings, malicious prosecution, basis of, 487
- Banns, publication of, 1158
- Bare trustee, not protector of settlement, 566
- Battery,
 - action for,
 - barred by summary process, when, 438
 - when maintainable, 432
 - consent of plaintiff to, 432, 433
 - obtained by fraudulent misrepresentation, liability of defendant in trespass, 433
 - damages for, special damage may be proved in aggravation of, 439

INDEX

Battery—*contd.*

- defined, 432
- every imprisonment, does not include, 439 *n.*
- force applied actually or directly to body of plaintiff in action for, 432
- force used in justifiable case of,
 - must be more than necessary, 436
 - resulting in wounding not justified, 436
- justified when act committed
 - in defence of possession of land or chattels, 434, 435
 - in ejecting person making disturbance in public place, 435
 - in ejecting trespasser, 435
 - in resisting illegal entry on land, 434
 - in self-defence with reasonable force, 434
 - on child ward, apprentice or pupil by way of moderate chastisement, 436
 - to effect a lawful arrest, 437
 - to prevent continuance or repetition of breach of the peace, 437
 - to prevent felony, 437
 - to prevent unlawful seizure of chattels in defendant's possession, 435
 - to take chattels to possession of which defendant entitled, 436
 - when consequences of act not foreseen by defendant, 433
- special damage in action of, need not be alleged or proved, 439

Benefice, ecclesiastical. *See* "Advowson."

Beneficiary,

- claim by intestacy of, 1311—1312
- death of testator caused by, 1277
- debt owed by, to personal estate of intestate, 1311
- gift of property of, 1278
- insufficient description of, 1262
- marshalling of assets by, 1398—1401
- title of, 1267
 - in intestate succession, 1296

Bequest, definition of, 1261 *n.*

Bet, loan for, 312, 313

- to pay lost, recovery of, 312 *n.*
- to make, recovery of, 312 *n.*
- money paid on, not recoverable, 312
- money received on, recoverable from agent, 312

Bigamy,

- definition of, 1188
- voidance of marriage by, 1172, 1187

Bill of exchange and promissory note

- agent acceptor personally liable for, 61
- bearing date on Sunday not invalid, 69
- conditional payment by, 173—174
- contract to pay debt by, interest on, 118
- conversion of, by banker collecting for person with no title to, 416
- falling due on Bank Holiday, payment and notice effectual on following business day, 68
- Sunday payable on previous day, 68 *n.*

interest on,

- for what period payable, 118
- from what date payable, 118
- recoverable as damages after maturity, 118
- "month" in, means calendar month, 69

INDEX

- Bill of exchange and promissory note—*contd.***
 notice of dishonour on following business day when due on Bank Holiday, 68
 security for gambling debt, 313
- Bill of lading,**
 deposit of, effect, 983
 indorsement of, 943
 nature of, 943 *n.*
 shipment and condition, evidence of, 943
- Bill of sale,**
 absolute,
 effect of, 941
 requirements of, 941 *n.*
 exemptions from statutory provisions, 942
 future goods, of, 951
 registration, not notice of, 954
 security,
 and bankruptcy of grantor, 952
 effect of, 950, 952
 not for less than £30. . 952
 requirements of, 950 *n.*, 951 *n.*
 rights of grantee, 953
- Blood relationship as consideration for contract, 93 *n.***
- Bona vacantia,***
 Crown's right to, 1328
 Executors Act, 1830, effect on, 1328 *n.*
 executor's right to, 1328
- Bond,**
 conditioned for performance
 of written promise, 987
 or non-performance, construed as contract, 140
 condition not money or writing, 988
 impossibility of performance of condition of, 140
 interest
 on penal, 118
 on single, 118
 money,
 amount recoverable by creditor on, 50
 definition, 987
 nature of, 987
 obligor and obligee, who are, 92 *n.*
 procedure on, 988 *n.*
- Books of partnership. See "Partnership."**
- Booths, customary right to erect, 747**
- Breach of contract, procuring,**
 contracts to which applicable, 479 *n.*
 damage gist of action, 479
 justification for, 479
 knowledge of defendant essential, 479
 nature of action, 479
 trade dispute, in, 480
- Breach of public duty, action for,**
 creditor, when liable for sheriff's wrong, 531
 general definition, 529
 sheriff, against, when entitled to indemnity, 529—530, 531, 532
- Breach of the peace, assault or battery justified if to prevent continuance or repetition of, 437**

- Bribe,
 agent accepting, answerable to principal in damages, 235
 to agent, person giving, answerable to principal in damages, 235
 received by agent, principal entitled to, 234, 235
- Bridge
 may not be substituted for ferry, 696
 not *per se* disturbance of ferry, 696
 public, obstruction to or danger to use of, a nuisance, 403 *n.*
- British ship. *See* "Ship."
- Broker "general agent" for employer, 55
 lien of, 964
- Brother,
 half-, of deceased workman "dependant" for purposes of compensation, 462
 of deceased workman "dependant" for purposes of compensation, 462
- Building,
 allowed to fall into dangerous condition a nuisance, 404
 occupier of, liability of, as inviter, 355
 reinstatement of, application of fire insurance moneys in, 306
- Building contracts, specific performance of, decreed, 127 *n.*
- Building scheme. *See* "Covenant running with inheritance."
- Business,
 goodwill of, sale of,
 payment out of profits of consideration for, 265
 right of vendor on, to carry on competing business, 289
 interference with,
 action for, nature of, trade dispute, in, 480
 trade dispute, no action in, 485
 of firm,
 acts done in course of, 268
 carried on at loss, dissolution by court, 283
 nature of, cannot be changed without consent of all partners, 278
 partner pledging firm's credit for purpose unconnected with, 269
 prolongation of partnership inferred from continuance of, 279
 right of partner to take part in management of, 277
- Bye-law approved by Government department not defective for purposes of
 employers' liability, 448 *n.*
- Canal company,
 damages recoverable from, for loss or injury, 257, 258
 increased charge by, for carriage of valuable animal, 258
 limitation of liability by, 256, 257
 must afford reasonable facilities for traffic, 256
- Canonry, income of, alienable, 999 *n.*
- Capacity,
 age of, as to marriage, 1174
 legal. *See* "Legal capacity."
- Capital of business, partners entitled to share equally in, 277
- Cargo, damage caused to, by collision at sea, rule applicable as to, where both
 parties to blame, 334 *n.*
- Carriage,
 by water, 260—261
 by sea, 260, 261
 limitation of liability in respect of, by railway and canal companies, 256, 257
 non-disclosure of character of goods delivered for, effect of, 259, 260
 of dangerous goods, duty of disclosure, 259

INDEX

Carriage—*contd.*

- of goods and passengers gratuitously, 259
- of goods by person not in capacity of common carrier, 259
 - contract of, 249
 - limitation of liability in, by railway and canal companies, 257
 - made by seller on behalf of buyer, 171
 - special terms embodied in, 254, 257
- of passengers, 258, 259
- of valuable goods, 252
 - increased charge for,
 - notice of, 253
 - recovery of, 254, 255
 - receipt for, 253
- supplier of, liability of, as inviter, 355

Carrier. *See also* "Common carrier."

- acknowledgment by, that goods held as bailee or agent for buyer ends transit, 176
 - continuing in possession of goods rejected by buyer, transit not ended by, 177
 - delivery
 - of goods to, 170—171
 - by unpaid seller, loss of lien by, 175
 - transit begun by, 176
 - taken from, by buyer or agent, ends transit of goods, 176
 - gratuitous, liability of, for damage caused by absence of reasonable care, 259
 - lien of,
 - extension of, by agreement or usage, 260
 - goods retained in exercise of, against consignor and consignee, 260
 - upon goods delivered for carriage in respect of charges, 260
 - master of ship chartered by buyer, whether goods in possession of, as agent or, 177
 - of goods not in capacity of common carrier, duties of, 259
 - of passengers,
 - duty of, to exercise reasonable skill and care, 258, 259
 - duty of, to provide fit vehicle, 258, 259
 - safety of vehicle not warranted by, 258, 259
 - security of passengers not warranted by, 258, 259
 - payment of charge of, in advance, right to, 250
 - retention of goods by, in exercise of lien when justified, 260
 - sale of goods by, to prevent loss, 261
 - stoppage of goods *in transitu*, by unpaid seller, 177, 178
 - wrongfully refusing to deliver goods to buyer or agent, transit ended by, 177
- Case, action of, under Statute of Westminster the Second, for nuisance, 391 *n.*
- Cattle, liability of owner of dog for injury done to, 359
- Certiorari, County Court judgment, removal by, 864 *n.*

Cestui que trust,

- occupation by, 643
- trustee of goods may maintain action of trespass though goods in occupation of, 410

Cestui que vie,

- corporation cannot be, 573
- presumption of death of, 582
- production of, 582

Champerty. *See also* "Maintenance."

- an aggravated form of maintenance, 40 *n.*
- charity no justification for, 498
- definition of, 40 *n.*, 498, 499

INDEX

- Change, demand of, on tender, 108
- Charge
- of interest of partner in partnership property, 276
 - option of other partners to dissolve a, 282
 - redemption by other partners on, 276
 - on goods, when amounting to conversion, 416
 - on land creates equitable interest, 750
- Charging order on debtor's interest in stock, 1056
- Charitable trust,
- notice of equity against, 756
 - rule against perpetuities and, 1077
- Charity. *See also* "Maintenance, action for, justification."
- definition of, 916
 - devise of land to, 915
 - form of gift of land to, 913, 914
- Chastisement
- by schoolmaster, extent and nature of authority as to, 437 *n.*
 - of child, ward, apprentice, or pupil, 436
 - of wife, husband has no right as to, 437 *n.*
- Chattels,
- assault or battery
 - to take, when justified, 436
 - when in defence of possession of, 434, 435
 - conversion of, appreciable damage in fact need not be proved in action for, 326
 - co-owners of, action of trover by, against each other, when maintainable, 418
 - co-owner of, sale by, professing to pass whole interest in, liability to action of trover for, 418
 - delivery of possession of, when ordered by court, 379, 379 *n.*
 - finder of,
 - action of trover by, 417
 - liability of, to owner, 417
 - may maintain detinue for, 424
 - sufficiency of interest of, to maintain action of detinue, 424
 - personal,
 - direct infringement of possession of, 407
 - possessor of land on which found may maintain detinue for, 424
 - wrongful appropriation of, by deceased, liability of personal representative for, 364
 - real, 15
 - seizure of,
 - by force by person entitled, 82
 - by force, entry upon land, 82 *n.*
 - for distress damage feasant, 84
 - unlawful, assault or battery to prevent, justified, 435
 - torts in respect of, committed during lifetime of deceased person, right of personal representative to sue on, 362
 - writ of delivery, appropriate machinery in case of, 379 *n.*
- Chattels corporeal,
- alienation cannot be restrained, 930, 931
 - attempt to evade execution against, 971 *n.*
 - devolution cannot be altered, 931
 - equitable ownership of, 932
 - execution, taking in, 970
 - future-acquired, transfer of, 940
 - gift of, 939
 - goods in transit, pledge of, 955

INDEX

Chattels corporeal—*conid.*

in custody of law cannot be distrained, 972
left to be worked upon cannot be seized under distress, 972 *n.*

lien

by agreement, effect of, 965
extinction of, 967
none by trespasser, 965
not lost by express agreement for remuneration, 964
on, by operation of law, 961
on, general, 960, 961
on, nature of, 960
on, particular, 960
particular, extent of, 960
particular, when arising, 963
vendor's, 964
waiver of, 968

lienor

has generally no right of sale, 966
liabilities of, 967
no charge for safe custody, 966
who has right of sale, 966

long possession, no title by, 947

mortgage of, 949

not seizable in execution, 971 *n.*

ownership,

deed, by, 937
of, how acquired, 936
passes on sale, when, 944
when acquired by delivery of, 937

pass on bankruptcy, 969

perishable, cannot be distrained, 972 *n.*

pledge of, 954

pledged, return of, 959

pledged goods not distrainable, 958

pledged goods not in order and disposition of pledgee, 957

pledgee,

liabilities of, 956
rights of, 955, 956
user by, 957

pledges liable to execution, 958

pledgor may sell, 957

pledgor's right of redemption, 956

powers of appointment of, 947

specific delivery of, 929

use, in, cannot be distrained, 972 *n.*

Cheque

bearing date on Sunday not invalid, 69

conversion of, by bank collecting, 416

on banker, tender of, in payment, 108 *n.*

Child. *See also* "Infant."

agent of parent, 58 *n.*

chastisement of, assault or battery justified if committed by way of, 436

covenants in marriage settlements may be enforced by, 104, 104 *n.*

education, of, liability for, 1213

en ventre sa mère,

acquisition of property by, 25

INDEX

Child—*contd.*

en ventre sa mère—contd.

- limitation of interest to, by deed, 25
- grand- of deceased workman "dependant" for purpose of statutory compensation, 462
- insurance for benefit of, 307
- insurance on life of, with Friendly Society or Industrial Company, 307
- legitimacy of, presumption of, 1206, 1207
- legitimation of, 1206
- no authority to pledge parents' credit, 57
- of deceased, action by personal representatives for benefit of, 363
- of deceased workman "dependant" for purposes of statutory compensation, 462
- of tender years,
 - amount of care expected from, 339
 - contributory negligence of person in charge of, 333
 - induced to commit act causing damage, 334
- of deceased partner, receiving annuity out of profits, 264
- offences against, 1223
- posthumous illegitimate, claim by, as "dependant" for compensation, 462 *n.*
- restraint upon body of, by father, 440
- services of, father entitled to, 1234, 1235
- step-, of deceased workman "dependant" for purposes of statutory compensation, 462
- torts by, responsibility of parent for, 57, 58

Chose in action,

- acquisition of, rules affecting, 980
- alienation,
 - equitable, 1050
 - of, "equities," 1049
 - of, involuntary, 1053
 - of, legal, 1047
 - of part of, 1047 *n.*
 - of, within Act of 1571.. 1058 *n.*
- Bills of Sale Acts, not within, 1052
- definition, 16, 17, 17 *n.*, 979, 980 *n.*
- deposit of documents, effect of, 982
- disclaimer of, by trustee in bankruptcy, 1053, 1054
- donatio mortis causâ*,
 - may be, 983
 - subject of, 1292
- future, alienation of, 1050, 1051 *n.*, 1052 *n.*
 - requires consideration, 1051
 - when notice effectual, 1052
- husband's right to wife's, 1315
- incapacity to hold or alienate, 980
- interpleader by debtor, 1049
- "legal," meaning of, 1048 *n.*
- minor
 - cannot alienate, 981
 - may repudiate, 981
- mortgage of, 1047 *n.*
- notice to debtor on assignment, 1048 *n.*
- order and disposition, in, when, 982
- ownership, rules affecting, 980
- personal representative's power in, 1362
- Sale of Goods Act, not within, 980, 1052

INDEX

- Chose in action—*cond.*
 - under Judicature Act, 1048 *n.*
 - whether included in personalty, 14
- Church,
 - brawling in, 442
 - forcible exclusion of person entering, by churchwarden, 435 *n.*
- Church of England, marriage in, 1155, 1156, 1157, 1158
- Cinematograph. *See* "Copyright, dramatic."
- Civil proceedings, malicious, action for, 495
- Clogging the equity,
 - doctrine applicable to chattels, 959
 - land, mortgage of, 830
- Codicil,
 - alterations in, 1252
 - confirmation of, 1240
 - documents incorporated in, by reference, 1239
 - form of, valid, 1237
 - law governing, 1241
 - form of, when executed abroad, 1242
 - joint, revocation of, 1246
 - lost, 1251, 1252
 - operation of, 1240
 - property conveyed subsequent to execution of, effect of, 1251
 - revival of revoked, 1253, 1254
 - revocation of,
 - by alterations, 1248
 - by destruction, 1248
 - by marriage, 1246
 - by revocation of will, 1251
 - "dependent relative revocation," 1249
 - formal, 1247
 - law governing, 1245
 - power of, 1245
 - signature to, 1237
- Coercion of wife, 1181
- Cognovit, nature of, 98
- Cohabitation,
 - duty of, 1179
 - relief from, by judicial separation, 1196
- Coin,
 - legal tender of
 - bronze, 108 *n.*
 - gold, 108 *n.*
 - silver, 108 *n.*
 - tender of current, 107
 - tender of foreign, 108 *n.*
 - wages of workmen must be in current, 225
- College, powers under Settled Land Acts, 911
- Collision at sea, damage caused to ship or cargo by, 334 *n.*
- Collusion,
 - bar to divorce, 1190, 1192
 - intervention of King's Proctor for, 1186
 - judicial separation barred by, 1194
- Commission
 - due to agent,
 - forfeited when, 236

INDEX

- Commission—*contd.*
 due to agent—*contd.*
 when payable, 237
 of agent, lien in respect of, on movables of principal, 237, 238
 secret, received by agent, principal entitled to, 234, 235
- Common carrier,
 accepting goods outside professed limits, 250
 answerable for goods carried, 250
 carrier by water incurs liability as, 260, 261
 charges of, must be reasonable, 249 *n.*
 definition of, 249, 249 *n.*
 delay in delivery or carriage arising from causes beyond control of, 251
 duty of
 to carry safely and deliver goods received, 249, 250
 to deliver goods at consignee's address, 251 *n.*
 to deliver goods within reasonable time; 250—251
 felonious acts of servants of, liability in respect of, 255
 increased charges by, for carriage of valuables, 253
 must be demanded by, 259 *n.*
 notice of, 253
 recovery of, 254, 255
 when liable to be refunded, 254
 increased charges by, in respect of valuables, receipt for, 254
 liability of,
 at common law, not affected by public notice or declaration limits, 252
 for goods as depositor, 251
 for goods as lien-holder, 251
 for goods as warehouseman, 251
 for goods as wharfinger, 251
 for goods until delivered to consignee, 251
 in respect of valuables, 252, 253
 received *en route*, 254
 may be varied or limited by special contract, 252
 lien of, effect of exercise, 251
 lien, general, none, 963
 loss by, of insured package,
 declared value not conclusive on, 255
 proof of value on, 255
 loss or damage to goods in custody of, when liable for, 250
 proof of value of parcel entrusted to, onus of, on party suing for loss or injury,
 255
 railway company as, in respect of personal luggage of passengers, 256
 rights, privileges, and liability of railway company as, 258
- Common employment,
 defence to action based on Fatal Accidents Act when, 448 *n.*
 injury to workman in course of, 446, 447, 448
- Common informer, action by, 990
- Common inn, definition of, 244
- Common interest. *See* "Maintenance, action for, justification."
- Common law,
 absolute duty imposed on employer by, and employment of independent contractor, 354
 action of workman at, defeat of, 451
 personal liability of servants of Crown for torts at, 341 *n.*
- Common of pasture,
 improvement and, 689

INDEX

- Common of pasture—*contd.*
 - definition, 716
 - extent of, 716, 717
- Common of shack, nature of, 675 *n.*
- Common of vicinage, nature of, 675 *n.*
- Common ownership, contingent remainder to heirs of two persons, 1094
 - created by severance of joint ownership, 1094
 - creation of, 1097
 - definition of, 1083
 - forms of, 1083
 - husband and wife in, 1087
 - partition of, 1085
 - patent, in, 1084
 - powers of co-owners, 1085
 - powers of co-owners, 1083
 - sale and division of proceeds, 1086
- Common property, existence of partnership not implied from, 263
- Company,
 - director of,
 - liability of, 544
 - recovery of contributions by, 325
 - liquidator of, assignment by, of action in tort, 365
 - promoter of, recovery of contribution for false statements in prospectus, 325
 - relation between members not a partnership, 262, 263
 - secretary of, attachment of wages of, 226 *n.*
 - share in,
 - certificate of, 1004 *n.*
 - deferred, definition, 1002
 - deferred, must be dated in prospectus, 1002
 - definition, 1000
 - forfeiture of, for non-payment of calls, 1006
 - fully paid, what, 1000
 - lien for calls, 1006
 - personal estate, is, 1000
 - preferred, definition, 1002
 - registered, must be, 1000
 - title to, evidenced by register, 1004
 - transfer, blank, effect of, 1005
 - transfer of, when void in liquidation, 1071
 - transferable, not after call made, 1005
 - shares of, when considered as realty, 15, 15 *n.*
 - stock,
 - certificate of, 1004 *n.*
 - differences between, and shares, 1003
 - shares may be converted into, 1003
 - title to, evidenced by register, 1004
 - transfer, blank, effect of, 1005
 - trading, dissolution of, 13 *n.*
- Compensation. *See also* "Workmen's compensation."
 - claim to, under Lands Clauses Consolidation Act, 1845. .366
 - enforcement of claim to, by tenant of agricultural holding, 360 *n.*
 - for work by apprentice for third person recoverable by master, 217 *n.*
 - on part performance of contract, 135
- Compromise, verdict of jury disturbed by Court on ground of being a mere, 372
- Concealment
 - of facts, specific performance refused on ground of, 126

INDEX

Concealment—*contd.*

of material facts from surety renders guarantee void, 292

Condition,

alienation, against, no relief for breach of, 798

alternative, effect of impossibility of one, 48

as to fitness or quality of goods, when implied, 165—166

as to time, redemption of mortgage not prevented by, 49

as to title of seller implied in contract of sale, 164

bankruptcy, against,

no relief, 798

relief for breach of, 799

benefit of, may be alienated, 796

breach of,

discharge of contract by, 144

for non-payment of rent, 797

operative as discharge, 146

remedy, 794

treated as breach of warranty, 163, 164

defined, 47

delivery of goods and payment of price concurrent, 168

fulfilment of, prevented by one party, 47, 48

implied, in contract of sale of goods,

by description, 165

by sample and description, 165

by usage of trade, 166

not negated by express, 166

that goods correspond with sample or description, 165, 166, 167

that seller has right to sell, 164—167

that vendor will make good title to property contracted to be sold,

185, 186

grantor, must be in favour of, 793

in contract, construction of, 147

"in law," 51 *n.*

just and reasonable, limiting liability of railway and canal company, 257

licence to break, effect of, 794

mining books, for inspection of, 798

of re-entry for non-performance of stipulation in lease, 50

onus of proof as to, 257 *n.*

penalty for breach of, not enforceable, liability to compensate for default valid, 50
precedent

of liability of surety

enforcement of claims against principal, 294

notice of default of principal debtor is not, 294

or suspensive defined ; subsequent or "resolutive" defined, 47

to performance, 146

vesting of right in fulfilment of, 47, 48

relief against breach of, 797—801

request for receipt is not a, 109

reverter on breach of, 652

stipulation in contract, when a, 163, 164

stipulation may be, though called a warranty, 164

subsequent,

contract discharged by, 144, 145, 146

discharge of contract by, existing rights of parties not affected, 146

effect of impossibility due to act of God, 48

interest in land forfeited by fulfilment of, 50, 51

INDEX

Condition—*contd.*

subsequent—*contd.*

- obligation defeasible on conveyance subject to, impossible, illegal or immoral, 48
- suspensive, specialty contract delivered subject to, 97
- time, stipulations as to, when construed as, 48, 49
- underlessees, relief to, against breach, 799
- waiver, effect of, 794
- when a warranty, 47

Condonation

- bar to divorce, 1190
- definition of, 1190
- judicial separation barred by, 1194

Conduct,

- acceptance of
 - goods by, 172
 - offer by, 91
- amounting to reasonable choice of difficulties, created by negligence of defendant, 333
- brutal, vindictive damages for, 370
- character and extent of performance, due under contract, determined by, 105
- delivery of specialty contract by, 96—97
- illegal or immoral, gift or promise in return for, 42
- intention declared by, 32
- malicious or high-handed, vindictive damages for, 370
- misconduct, concealment of, illegal, 41
- "natural and probable consequence" of defendant's, damage caused by, 327
- of servant in the course of employment, 352, 353
- person representing himself as partner by, liability of, 271
- principal and agent, relationship as to, created by, 53
- renunciation of contract by, 147

Confidence,

- betrayal of, by servant, 210
- breach of,
 - by employee, 222—223
 - by servant, 210
- contract involving cannot be performed by servant or agent, 110
- contracts involving personal, 111
 - not assignable, 141
- information obtained in, action for damages and injunction against person publishing, 427

Confirmation, of voidable transaction, 35

Connivance

- bar to divorce, 1189
- judicial separation barred by, 1193

Consent,

- battery justified by, when, 433
- battery without, 432
- defence to action of tort, when, 446 *n.*
- intentional or negligent harm committed
 - without, damages for, 445
 - with, what amounts to, 446
- of all existing parties, when necessary, 278
- to battery obtained by fraudulent misrepresentation, liability of defendant in trespass, 433
- variation of mutual rights and duties of partners by, 274 *n.*

INDEX

- Consideration,
 abandonment of unfounded claims may be valid, 94
 act antecedent to, no, 93—94
 act in pursuance of request a, 94 *n.*
 act or forbearance compelled by law no, 95
 act or forbearance contrary to law, morality, or public policy no, 95
 act subsequent to, no, 93, 94
 agreement discharging contract after performance by one party must be made for, 145
 duty of hirer to perform, 196
 equal value with promise not necessary, 94
 essential element of simple contract, 92
 "executed," "executory," executory becoming executed, 93
 executory,
 failure of, rescission of contract on, 320
 recovery of money paid in respect of, on total failure, 320
 illegal, 139
 payment connected with wager is, 313
 illusory, under Act of 1571.. 1061, 1062
 in contract must be valuable, 93 *n.*
 in contract of hire, 195
 in writing not essential in case of contract to answer for debt of another, 101
 irrevocable power of attorney given for valuable, 242
 marriage or blood relationship does not constitute valuable, 93 *n.*
 of contract, oral evidence admissible to identify, 101
 person undertaking to act as agent without, 228
 promise contrary to course of nature, no, 95
 promise impossible in law, no, 95
 release under seal of right of action in tort without, 368
 sale of goods, contract for, must contain money, 161
 specialty contract need not contain, 96
 want of, between assignee and assignor, no defence, 142
- Consignee,
 common carrier liable for goods till delivered to, 251
 common carrier must deliver goods at address of, 251 *n.*
 failing to accept delivery tendered by common carrier, effect of, 251
 goods retained by carrier against, in exercise of lien, 260
 receiving goods by mistake incurs no liability, 205, 206
- Consignees' lien, meaning of, 961
- Consignor,
 goods retained by carrier against, in exercise of lien, 260
 may be "seller" of goods, 174
 must declare nature of valuable goods, 254 *n.*
- Consolidation. *See* "Land, mortgage of."
 doctrine of, applicable to chattels, 959
- Consortium, action for loss of. *See* "Wife, action for loss of."
- Conspiracy, action of,
 business, to injure, 483
 damage gist of action, 481, 483
 definition, 481 *n.*
 essentials of, 481, 483, 484
 generally, 481
 history, 481, 482 *n.*
 judgment against one defendant, 484
 trade competition defence to, 484
 trade dispute, not in, 485

INDEX

Constable. *See also* "Arrest."

- arrest by,
 - for past misdemeanour without warrant, when justified, 437 *n.*
 - on suspicion of felony, 442, 442 *n.*
 - of person guilty of brawling in church, 442 *n.*
- privileges of, acting in obedience to warrant under hand or seal of a justice of the peace, 343

Contact,

- actual, with body of plaintiff not necessary in action for false imprisonment, 439

Contract. *See also* "Quasi-contract."

- acknowledgment 'reviving statute-barred claim must amount to promise to pay, 75
- action on, whether antecedent request or demand condition precedent to, 115
- agency, governed by laws of, 52
- ante-nuptial, of wife, liability of husband for, 58
- assignability of rights under
 - transaction involving personal confidence or consideration, 141
 - claim for unliquidated damages for past breaches, 141
- assignment of,
 - duty arising out of, 143
 - effect on stranger to, 103
- action on, right of, cannot be conferred on third party, 104
- assignment of rights under, 141
- bond conditioned for performance or non-performance construed as, 140
- breach of,
 - action for damages on, 120—121
 - action for, before performance due, 121
 - by bailee, 122 *n.*
 - by non-performance, 120
 - by expressed intention not to perform, 120
 - by party disabling himself from performing, 120
 - by party temporarily disabling himself, 120 *n.*
 - by tortious act or omission, election of remedies on, 336
 - damages for, 320 *n.*
 - damages for, liquidated or penalty, 137
 - damages for loss following, must not be remote, 122
 - damages for, mitigation of, 124
 - damages for, nominal, 124
 - for sale and purchase of real estate, damages for, 121 *n.*
 - injunction to restrain, 128, 128 *n.*
 - injured party may make good and recover damages, 123
 - measure of damages, 121
 - penalty for, not recoverable, liquidated damages recoverable in full, 137
 - promise to pay a fixed sum of money, 120—121
 - prospective, damages for, 123
 - to marry, damages for, 122
 - waiver of, 147
- by married woman, 28—29
- by minor for repayment of money lent void, 21
- by person of unsound mind voidable, 26
- by way of gaming or wagering. *See* "Gaming," "Wagering."
- claim arising out of, cannot be converted into claim in tort to make minor liable, 347 *n.*
- conclusion of,
 - by acceptance by post, 90—91

INDEX

Contract—*contd.*

- conclusion of—*contd.*
 - by concurrent expression of intent, 87
 - by offer and acceptance, 87
 - earnest as evidence of, 136
- conditional on happening of event, whether debtor entitled to notice, 115
- condition in, what is, 47
 - prevented from fulfilment by one party, 47, 48
- conditions precedent and subsequent defined, 47
- consideration essential in simple, 92
- consideration for,
 - act antecedent to promise is not, 93—94
 - act antecedent in pursuance of request, 94 *n.*
 - act or forbearance compelled by law, no, 95
 - act or forbearance contrary to law, morality or public policy, no, 95
 - act subsequent to promise is not, 93, 94
 - "executed," "executory," executory when becoming executed, 93
 - must be valuable, 93 *n.*
 - need not be of equal value with promise, 94
 - promise contrary to course of nature no, 95
 - promise impossible in law no, 95
 - what constitutes valuable, 93, 93 *n.*
- consideration of,
 - need not be in writing, in contract to answer for debt or default of another
 - 101
 - oral evidence admissible to identify, 101
 - "continuing" by minors, voidable up to reasonable time, 22
 - "continuing," what is, 22
 - default by one party to, 321
 - defined, 85
 - delivery of goods in pursuance of, when no place appointed, 112, 112 *n.*
 - discharge of,
 - by agreement, when one party has performed, 145
 - by oral agreement, 145
 - by tender without payment of money debt, 107
 - modes of, 144, 147
 - dissolution of, by subsequent impossibility, rights previously acquired not affected, 132
- documents
 - containing terms of, need not be made for purposes of evidence,
 - 101
 - constituting, sufficiency of date of, 102
 - duty arising out of, unassignable, 143
- earnest
 - and damages in breach of, 136, 137
 - as evidence of conclusion of, 136
- enforcement
 - by representatives of deceased creditors, 111
 - of specialty barred by period of twenty years, 72
- entered into on Sunday, when void, 69
- executory in nature, 93 *n.*
- executed, ceases to exist, 93 *n.*
- for goods supplied to minors, validity of, 21
- form of, effect of agreement as to, 91
- gathered from several documents, sufficiency of signature on, 101
- illegality induced by penalty renders void, 139

INDEX

Contract—*contd.*

- impossibility of,
 - effect of knowledge of, 129
 - in fact, 129
 - partial, effect of, 132
- independent contractor, liability of employer for acts of, 59
- insolvency of co-promisor, effect of, 156
- interest under, accrues from day to day, 116
- involving
 - exercise of debtor's personal skill cannot be performed by servant or agent, 116
 - personal confidence cannot be performed by servant or agent, 110
- in writing,
 - absence of, when no defence, 98—99
 - sufficiency of note or memorandum in, 100, 101
 - when necessary
 - executor or administrator promising to answer damages out of own estate, 97
 - promise in consideration of marriage, 97, 98
 - promise not to be performed within a year, 97, 98
 - for sale of goods of 10 pounds or upwards, 99
 - promise to answer for debt of another, 97—98
 - promise to transfer interest in land, 97—98
- legal obligation,
 - intent to create, essential, 86
 - must be ascertainable, 87
- made by agent
 - in England, liability of foreign principal for, 63
 - when agent liable on, 60—61
- material alterations in written, effect of, 149
- money paid under void or voidable, recovery of by minor, 23
- of drunken person, 28
- of sale of interest in land, 192
- offer, when communicated, 88
- oral evidence, parties to, admissible to identify, 101
 - admissible to identify subject-matter of, 101
- parol or simple, 92
- parol evidence, proof of, by, in absence of writing, 98—99
- part performance of,
 - acceptance of, waiver by, 135
 - rights of party performing, 135
 - where not in writing, effect of, 98—99
- parties to, 103
 - cannot confer right of action on persons not, 104
 - promisee unknown, 103
 - sufficiency of description, 101
- penalty payable by, for non-performance of impossibility, amounts to voluntary promise, 140
- performance of,
 - by agent, 110
 - by infant, not enforceable, 128 *n.*
 - by parties to, 105
 - by servant, 110
 - character and extent of, how determined, 105
 - dependent upon concurrence of parties, 106
 - earnest given as security for, 136

INDEX

Contract—*contd.*

performance of—*contd.*

- impossibility of,
 - arising from foreign law, 129
 - of one of two alternatives, 131
 - after choice made, 131, 132
 - in nature impossibility in law, 129
 - in law known to one party only, 129 *n.*
 - in fact, effect of, 129
 - knowledge of, 129
 - supervening, effect of, 130
- inability as to, does not amount to impossibility, 132, 133
- incomplete, compensation in respect of, 135
- left to determination of one party, 87
- limitation of reasonable time for, 148
- must be complete and in terms of, 105
- not excused by non-concurrence of third party, 107
- place of, 111
- reciprocal, interdependent promises, order of, 134, 135
- tender of,
 - effect of failure to accept, 106
 - must be unconditional and complete, 106
 - payment in, production of money on, 107
 - time and mode of, 106
- time for, 112
 - extended by agreement or request, 113
- essence of, 113
- what amounts to, 106
- when excused, 111
- when reciprocal promises independent, 134
- when reciprocal promises interdependent, 139
- personal, not assignable, 141
- personal representative's liability for completion, 1405 *n.*
- promisor and promisee in, 92
- ratification of, by minor on attaining majority, when not enforceable, 24
- recovery of money paid under, in respect of executory consideration which has failed, 320
- rescission of, by unreasonable delay in fulfilment of stipulation as to time, 148
 - on failure of executory consideration, 320
- simple, not binding without consideration, 92
 - discharge of, by creation of specialty, 148, 149
- specialty, 92
 - discharge of, by performance of substituted simple contract, 145 *n.*
 - discharges identical obligation created by simple, 148, 149
 - delivery of,
 - as escrow, 97
 - by declaration of intention, 96, 97
 - by transfer of possession, 96, 97
 - execution of, in duplicate, 97
 - promise in, termed "covenant," 92 *n.*
 - requisites of, 96
 - signing not essential in, 96 *n.*
 - unilateral,
 - need not be executed by promisee, 97
 - when binding, 97

INDEX

- Contract—*conid.*
 specialty—*conid.*
 unilateral—*conid.*
 void *ab initio*, when, 97
 without consideration
 valid, 96
 remedy for breach of, 96
 specific performance of. *See* "Specific Performance."
 specifically enforceable in equity, though not in writing, 98—99
 stranger to, when liable, 103
 suing in tort, 336
 subject-matter of, identified by oral evidence, 101
 terms of, ascertainable from several documents, 100, 101
 terms in, construction of, by court, 147
 time for, expiring on holiday, effect of, 68
 "time the essence of," 49
 essence of, effect of extension by request or agreement, 113
 to answer for debt or default of another, consideration of, need not appear
 in writing, 101
 to build, when specifically enforced, 127 *n.*
 to pay debt by bill or note, interest on, 118
 tortious act of minor indirectly connected with, plea of infancy no defence to
 action for, 347
 unenforceable, 86, 86 *n.*
 by action may still be valid, 100
 rendered enforceable *ex post facto*, 86 *n.*
 unless in writing, 86 *n.*
 under statutory powers of S. L. Acts, 889
 void if no intent to create legal obligation, 85
 voidable if option to avoid or affirm, 85
 warranty in, distinguished from condition, 47
 writing under seal, required by law to be in, 96
 Contractor, wrongful acts of, employer and independent contractor liable for,
 355 *n.*
 Contribution
 amongst co-promisors, 156
 on insolvency of one, 156
 amongst joint tort-feasors, 270 *n.*, 336, 337
 by co-sureties, 296, 297
 by co-surety can only be in respect of money paid, 297
 by released co-surety, 301 *n.*
 joinder of person liable to make, as third party in action by creditor, 302
 presumption of equal, may be rebutted, 156 *n.*
 to losses of business, equal liability of partners, 277
 when director of company may recover, 325
 Contributory negligence. *See* "Negligence."
 Control
 exercised by master over servant,
 evidence of, 351
 question of fact, 351
 Conversion, tort of,
 act of ownership for purposes of, what amounts to, 415, 416
 evidence of, defendant's refusal to give up goods is *prima facie*, 419
 of bank notes, 414 *n.*
 of chattels, appreciable damage in fact need not be proved in action for,
 326

INDEX

- Conversion, tort of—*contd.*
 of goods,
 action of trover for, 414
 bargain and sale not amounting to, 417
 by collection of cheque or bill by bank on behalf of person with no title to, 416
 by delivery to third person with intent to pass ownership or possession, 416
 by pledgee, 416 *n.*
 by pledging or charging, 416
 defined, 414
 destruction, amounting to, 416
 pledgee, *bonâ fide*, when guilty of, 419, 420
 purchaser, *bonâ fide*, when guilty of, 419, 420
 unauthorised user or consumption amounting to, 416
 term superseding trover, 415 *n.*
 title relating back to date of, sufficient to maintain trover, 417
- Conversion, equitable,
 doctrine of,
 applied to infant's estate, 1360 *n.*
 applied to lunatic's estate, 1360 *n.*
 applied to married woman's estate, 1360 *n.*
 "failure of purposes," ambiguity of expression, 1359 *n.*
 option to purchase, effect of, 1360
 real and personal estate, 1356, 1357
 "reconversion," term discussed, 1361
- Conveyance
 by or to minors by way of feoffment, 22
 validity of, 22
 condition in,
 prevented from fulfilment, 47, 48
 what is, 47
 condition subsequent in, rendered impossible by act of God, effect of, 48
 duty of vendor of land to execute proper, 189
 covenants for title in, implied from use of appropriate words, 189 *n.*
 drunken person, by, 28
 purchaser and
 preparation of, 189, 190
 purchase money, 190
 vesting legal and equitable ownership in purchaser, duty of vendor to execute and procure execution of, 188
- Conveyancing Acts, trustee need not exclude, 1129
- Convict,
 administration of property of, in accordance with Forfeiture Act, 1870. .20, 21, 21 *n.*
 administrator of property of, alienation by, 918
 alienation by, 918
 alienation of chattels by, 977
 capacity of, 20
 legal incapacity of, 2
 property of, vests in administrator appointed by Court, 20, 21
 trustee, may be, 1106
 will of, 918, 1256 *n.*
- Co-owner,
 action by, in tort, against stranger in respect of common property without joining other co-owners, 349

INDEX

- Co-owner—*contd.*
 - effect of licence to one, 795
 - of chattel, action of trover against other, when maintainable, 418
 - of land,
 - action of trespass by, against other, when maintainable, 387
 - recovery of possession and mesne profits by action in nature of ejectment 388, 389
- Co-ownership, account of profits, 319, 1084
- Co-parcenary,
 - creation of, 1095
 - descent in, 1095—1096
 - survivorship, none, 1095
- Co-promisees,
 - joint or several, 156
 - question of construction for Court, 157
- Co-promisors,
 - contribution amongst, 156
 - on insolvency of one, 156
 - discharge of, by performance by one, 154
 - execution on judgment obtained against upon one, 155
 - joint, 153
 - and several, 154
 - liability of each, for whole performance promised, 154
 - several, 153
- Copyhold,
 - action for breach of custom, 591, 592
 - admittance of tenant for life admits remaindermen, 597
 - admittance to, 588
 - alienation of, 590
 - within Act of 1571, 1058 *n.*
 - boundaries, tenant bound to preserve, 593
 - conveyance, form of, 809
 - corporation cannot claim enrolment as tenant, 590
 - custom and, 586
 - definition of, 584
 - devise of, 586
 - division of, 587
 - enfranchisement,
 - common law, 604
 - compulsory, 600
 - consideration for, 599, 600
 - escheat not affected by, 602
 - franchises not affected by, 602
 - gavelkind not affected by, 602
 - general, of manor, 603
 - marital rights preserved, 602
 - minerals not affected by, 602
 - of, effect, 554, 603
 - of tenant in tail, effect of, 605
 - of, voluntary, 598, 599
 - option to buy out claimant, 601
 - right of common not affected by, 602
 - sporting rights not affected by, 602
 - suspension of, 601
 - estates in, 585
 - estate tail in, how barred, 589

INDEX

Copyhold—*contd.*

- finer,
 - action for, 591
 - "arbitrary," 595
 - for renewal paid by limited owner, 596
 - go to tenant for life of manor, 596
 - when due, 591
 - fees of steward, action for, 591 *n.*
 - forfeiture, relief against, 592
 - form of mortgage of, 815
 - grant of, 585
 - heir of, 587 *n.*
 - incidents of, 589
 - lease of, 590
 - lives, successive, for, construction of, 597
 - Locke King's Acts, and, 589
 - lunatic, admission of, 591 *n.*
 - mandamus against lord, 593
 - manorial rights, extinguishment of, 607
 - minerals and timber belong to lord, 594
 - new grant of, 587
 - partition of, 587
 - quasi-fee simple and quasi-entail in, 598
 - real assets, distinguished from, 1371 *n.*
 - reduced fine to tenants of manor, 595
 - sale of, timber and minerals not included in, 187 *n.*
 - seizure *quousque*, 591 *n.*
 - settlement of, 590
 - statutory provisions, not included in, 589
 - steward, compensation on enfranchisement, 601
 - surrender of, need not be presented, 588
 - tenure, 15
 - title to grant, 585 *n.*
 - waste by tenant, 594

Copyright,

- acts not infringement of, 1039, 1040, 1041
 - artistic, definition, 1034
 - assignment of, 1036
 - breach of, remedies for, 427 *n.*
 - common law rights abolished, 1046
 - compulsory licences, 1042
 - Dominions, in, 1043
 - dramatic,
 - cinematograph and, 1033
 - definition of, 1033
 - duration of, 1034
 - existing in 1912,
 - duration of, 1035
 - extension of, 1037
 - foreign, 1043 *n.*, 1044 *n.*
 - forfeiture of pirated copies, 1045
 - importation of pirated copies, prohibition of, 1045, 1046
 - infringement of, 1038, 1039
 - account in lieu of damages for, 426
 - damages for, 426
 - injunction for, order for account, obtained as ancillary to, 378

INDEX

- Copyright—*contd.*
 infringement of—*contd.*
 injunction to prevent, 426
 period of limitation, 73, 1045
 remedies for, 1044, 1045
 joint authorship and, 1034
 literary, definition of, 1032
 mechanical, duration of, 1035
 musical,
 definition, 1033
 seizure of pirated copies, 1046
 photographic,
 duration of, 1035
 title to, 1038
 posthumous, 1034, 1035
 reproduction of old works, 1041, 1042
 reversion to author's representatives, 1036
 title to, 1036
 scope of, 1042, 1043
 work of employee, 1038
- Co-representative,
 compromise with personal representative, 1411
 definition of, 1349
 equitable claim created by, 1408
 liability for acts or defaults of, 1422
 powers of, 1407, 1413
 sale of assets by, 1408
- Coroner, torts of, in course of judicial duties, action for, not maintainable,
 342 *n.*
- Corporation,
 acts of officials, servants, and agents binding on, 10, 11
 action by,
 for defamation, 9 *n.*
 for tort affecting personal reputation of members of, not maintainable,
 346
 maintainable for torts affecting business or property, 346
 alienation of land by, 910
 ancient corporation, property of, vesting in Crown, 13 *n.*
 by prescription, 6
 constitution of, determined by immemorial custom, 8
 by-laws, power to make, belongs to whole body, 12
 created by authority of State, express or implied, 6
 dissolution of,
 by Act of Parliament, 12
 by death of members, 12
 by surrender duly enrolled, 12
 by judgment of revocation on *scire facias*, 12
 by order of the Court, 13
 by statutory formality, 13
 reversion of frankalmoigne and socage, 13
 vesting of property of ancient corporation in Crown, 13 *n.*
 vesting of property held jointly, 14
 vesting of personal property in Crown, 13
 domicile of, 7
 in case of trading, 7
 fee simple, conveyance of, to, 556

INDEX

Corporation—*contd.*

- foreign,
 - defined, 8
 - may bring or defend actions, 7, 8
 - powers of, 7
 - frankalmoigne and socage, reversion of, on dissolution, 13
 - interest in land forfeited if assured to, 10
 - Irish, cannot be sued in England, 8
 - joint tenant, may be, 910
 - land, no right of, to hold, by copy of Court roll, 10
 - legal capacity lost by winding up, 13
 - liability of, for torts committed by its officers or servants in course of employment, 346
 - to action for defamation, 521
 - mortmain, and, 10, 865, 909
 - personal property vests in Crown on dissolution, 13
 - powers of, 9, 9 *n.*, 10 *n.*
 - property may be held by, jointly, 9 *n.*
 - representation as to credit of another person, liability of, for, 350 *n.*
 - Scottish, cannot be sued in England, 8
 - torts authorised or ratified by, liability for, 350
 - trading companies, dissolution of, 13 *n.*
 - trustee, may be, 1106
 - winding up,
 - administration of property in, by liquidator, 13
 - effect on capacity, 13
- ## Corporations aggregate,
- administration of affairs, in whom vested, 8
 - agents of, appointed under common seal, 53
 - by-laws of, 12, 12 *n.*
 - cannot become corporation sole, 7
 - constitution of, determined by documents of incorporation, 8
 - contracts and conveyances entered into through medium of common seal, 11
 - defined, 7
 - meetings of members, 8, 9
 - member may contract with, 11
 - power to make by-laws, 12
 - power to remove officers and members for reasonable cause, 12
 - seal, when unnecessary, 11 *n.*
- ## Corporation sole, 6, 7, 7 *n.*
- chattels corporeal, cannot acquire, 976
 - ecclesiastical or eleemosynary claims to land or rent limited by lapse of time, 78, 79
 - personal property cannot generally be acquired by, 10
 - question of fact as to acts of individual acting as, 7
- ## Corporeal hereditament. *See also* "Incorporeal hereditament."
- definition, 547
 - freehold estate subject to term of years regarded as, 16 *n.*
 - life interest in land is, 16 *n.*
 - terms of years in possession classed as, 16 *n.*
 - what interests in land included in, 16
- ## Costs,
- in litigation by person restrained from anticipation, 46
 - on award of nominal damages, 124
- ## Counterclaim, debtor may avail himself of action by creditor, 109

INDEX

- County court,
 - action in, not maintainable on judgment obtained in High Court, 323
 - judgment of, action on, not maintainable, 323, 323 *n.*
 - removed by certiorari, 864 *n.*
- County (franchise of), abolished, 686 *n.*
- Court. *See also* "County Court" ; "High Court."
 - action of tort may be brought against Colonial Governor in English or Colonial, 341
 - damages awarded by, in lieu of injunction, when, 377
 - discretion of, to grant injunction for commission, continuance, or repetition of tort, 374
 - interlocutory orders by,
 - may be conditional, 375 *n.*, 376 *n.*
 - when granted, 375 *n.*, 376 *n.*
 - injunction or mandatory order by, to restrain continuance or compel removal of nuisance, 400, 401
 - jurisdiction of English or Colonial, in action of tort against Colonial Governor, 341
 - mandatory injunction by,
 - to prevent tort, when granted, 376
 - granted by way of interlocutory order, 367 *n.*
 - ministerial officer of, when liable for executing order of Court or magistrate acting judicially, 343
 - of equity, actions concerning contracts or equities affecting lands situated abroad, entertained by, 339 *n.*
 - superior, of Scotland and Ireland, effect of registration of judgments of, 323 *n.*
- Court baron. *See* "Manor."
- Covenant,
 - breach of,
 - in lease, liability of personal representative, 1364
 - personal representative's liability, statutory protection for, 1366
 - repair, to, personal representative's liability, 1366
 - running with inheritance,
 - benefit runs at law, 802
 - benefit, to whom passes, 802
 - burden does not run, 803
 - burden runs in equity, when, 803
 - building scheme, implication from, 805
 - building scheme, when, 804
 - change of circumstances, effect of, 806
 - liability for breach of, 1364 *n.*
 - nature of, 802
 - responsibility of occupier for acts of predecessor, 806
 - running with freehold, benefit of, 1362
 - survival of liabilities in respect of, 1363
- Credit,
 - expiration of term of, lien of unpaid seller after, 175
 - of another person, representation as to, liability for, 350 *n.*
 - of firm, pledge of, by partner for purpose outside business, 269
 - sale of goods, without stipulation as to, lien of unpaid seller on, 175
- Creditor,
 - abandonment of security by, discharge of security on, 300
 - action by,
 - joinder as third party in, of person liable to surety for indemnity or contribution, 302
 - surety in name of, 296

INDEX

Creditor—*contd.*

- appropriation of payment by, 113, 114
 - to unenforceable debts, 113, 114
- change, not bound to give, 108
- defeat or delay of, illegal, 41
- disclosure by, to surety, 293
- disturbing order of resort to assets, 1398, 1399
- enforcement of claim by, not condition precedent of liability of surety, 294
- forbearing to sue principal debtor, whether surety discharged by, 298
- fraud on, by matrimonial insurance, 307
- insurable interest of, in life of debtor, 306, 308
- marshalling of assets by, 1401 *n.*
- misrepresentation or concealment of material facts by, renders guarantee void, 292
- personal representatives of deceased may enforce performance, 111
- reservation by, of rights against surety,
 - effect of, 298, 299
 - on release of principal debtor, 298, 299 *n.*
- revocation of continuing guarantee by notice to, 293
- right of action of, on bankruptcy of debtor, 149
- set-off against, by surety, 296
- subrogation of, 1417
 - remedies of, to party, 296
- tender of payment
 - to, production of money dispensed with by, 107
 - to, objection to quantity, not quality, 108 *n.*
 - refused by, on specified ground, 109

Crim. con., action for, abolished, 470 *n.*

Criminal proceedings, malicious prosecution, basis of, 487, 488—489

Cross remainders,

- nature of, 656
- implied, when, 656, 657 *n.*

Crowds, assembly of, a nuisance, 402

Crown,

- act authorised or ratified by British, alien in foreign State cannot maintain
 - action of tort in respect of, in England, 340
- chattels of, cannot be distrained, 972 *n.*
- claims by,
 - no extinction of title on limitation of action, 80
 - rule as to priority in time excepted, 67
- employees of, position of, as regards compensation payable for injuries received, 463
- Heir-Apparent to, claims against, barred by period of three months, 74
- official, subordinates of, not servants, 340 *n.*
- order of, no defence to action against public official in private capacity for torts, 340
- personal liability of servants of, for tort at common law, 341 *n.*
- public officials contracting on behalf of, not personally liable, 61
- servants of, torts of, liability for, 340
- suits by and against, not affected by Statutes of Limitation, 79
- tenant at sufferance of, none, 762
- torts of, no proceedings can be taken for, 340

Crown debts,

- priority of, in administration of assets, 1377
- surety paying, priority of, 1377 *n.*

INDEX

- Crown extent, applies to chattels, 972 *n.*
- Cruelty,
 definition of, 1188
 divorce in relation to, 1188
 judicial separation granted for, 1193
- Currency, debt payable in foreign, amount recoverable, 109
- Current coin,
 cannot be distrained, 972 *n.*
 title of *bonâ fide* acquirer, 938
- Curtesy,
 conditions of, 1313
 copyhold lands in, 1314 *n.*
 custom of gavelkind, by, 1314 *n.*
 estate by, 1313 *n.*
 tenant by,
 has powers of tenant for life under S. L. Acts, 884, 886
 rights and liabilities of, 1314
- Custody,
 liability of common carrier for goods in, 250
 safe, goods deposited with innkeeper for, 246
- Custom,
 agent may be personally liable by, when acting for undisclosed principal, 61
 contract to pay interest on debt may be inferred from, 115
 general lien allowed by, to agents, 238 *n.*
 lien of agent may be extended by, 238
 money payable by valid, enforcement of obligation as to, by action, 323,
 324
 of manor, minerals and timber excluded from sale of copyholds by, 187
 proof of, 858
 trespass to land in exercise of lawful, justifiable, 385
- Customary freehold, definition of, 606
- Customary rights,
 abolished only by statute, 746
 definition, 744
 distinguished from incorporeal hereditaments, 745 *n.*
 list of, 746—747
 profit à prendre cannot be, 744
 reasonable, must be, 745
- Cygnets, ownership of, 937
- Damage,
 abatement of nuisance must be done without avoidable, 399
 actual, suffered by plaintiff in action of false imprisonment, 439
 alleged in action founded on negligence, 319
 appreciable,
 must be caused by act or omission amounting to tort, when, 326
 need not be proved in actions for trespass, 326
 by dangerous animal, liability of person keeping for, 360, 361
 by escape of dangerous substances, 405, 406
 by wild animals, when occupier of land liable to neighbour for, 360
 caused by
 domestic animal trespassing, liability of owner for, 358
 negligence of defendant in conjunction with third party, 334
 negligence of defendant, when presumed, 330
 nuisance, estimate of, 393, 394

INDEX

Damage—*contd.*

caused by—*contd.*

- tort, must be natural and probable consequence of defendant's conduct, 327, 327 *n.*
- committed by dog, person keeping not liable unless *scienter* or negligence proved, 360
- contributory negligence decisive cause of, effect of, on action of tort, 333
- pecuniary, caused by malicious acts or omissions, 335
- permanent, to premises, caused by nuisance, action by reversioner in respect of, 395, 396
- personal and proprietary, severance of action when, 367 *n.*
- remoteness of, 327
- special,
 - in action of assault or battery, 439
 - suffered by plaintiff, in action for infringement of public rights, 327, 328
 - suffered by public nuisance a ground for abatement of, 400
- to inheritance, action by reversioner or remainderman against stranger in respect of, 405
- to ship or cargo, caused by collision at sea, when both parties to blame, rule applicable on, 334 *n.*
- unusual, done by domestic animal, when defendant liable for, 358, 359

Damages,

action for,

- against person publishing slander of goods, 428
- against person publishing information obtained in confidence, 427
- against person publishing literary or artistic compositions without authority, 427
- against person publishing photograph without authority, 427
- against person threatening proceedings for infringement of patent, 426 *n.*, 427 *n.*
- against slanderer of plaintiff's title to property in land, 406
- by personal representative, 363
- by reversioner or remainderman for waste, 405 *n.*
- aggravation of, proof of malice material in, 335 *n.*
- amount of,
 - recoverable in action by personal representatives for loss suffered from death of deceased, 363
 - recoverable by or in respect of workman under Employers' Liability Act, 451, 451 *n.*
 - in action of tort a question for jury, 369
- ascertainment of, by judgment before date of receiving order, 367
- assessment of,
 - by jury, Court cannot alter, 124, 372 *n.*
 - in case of continuing torts, 372
 - loss subsequent to, 123
 - under Employers' Liability Act, 452
- awarded to employer against workman, deduction of, from wages, 225 *n.*
- breach of contract gives right to action for, 120—121
- breach of duty giving rise to action for, tort is, 326
- claim for account is alternative to claim for, in respect of same tort, 378 *n.*
- cost of making good breach, may be included in, 123
- earnest taken into account in estimating, 136, 137
- estimate of,
 - in action of tort, 371
 - in claims under Fatal Accident Act, 1846 . . 371 *n.*
- exemplary or vindictive, when awarded by jury in action of tort, 370

INDEX

Damages—*contd.*

- for anticipated future breaches not recoverable, 123
- for apprehended tort not awarded, 373
- for assault or battery, special damage may be proved in aggravation of, 439
- for betrayal of confidence, liability of servant for, 210
- for breach of confidence by employee, 223
- for breach of contract, 320 *n.*
 - action for, after waiver of breach, 147
 - by bailee, 122 *n.*
 - for sale or purchase of real estates, 121 *n.*
 - in action brought before performance due, 121
 - measure of, 121
 - to lend or borrow, 201
 - to pay a fixed sum, 120—121
 - mitigation of, 124
 - to marry, 122
- for breach of specialty contract without consideration, 96
- for breach of statutory duty, exclusion of action for, injunction granted on, 328 *n.*
- for breach of warranty, measure of, 163, 164, 181, 182
- for continuing injury, effect of payment of, 372 *n.*
- for disappointment of mind or injured feelings, 122
- for dispossession recoverable in action of ejectment, 388
- for infringement of copyright, 426
- for infringement of patent, 426
- for infringement of registered trade marks, 426
- for injury to or loss of animals carried by railway or canal company, 257, 258
- for injury sustained by borrower from undisclosed defect in thing lent, 198
- for loss arising from non-disclosure of dangerous goods to be carried, 259
- for loss due to subsidence of land caused by neighbour, 373 *n.*
- for loss following breach of contract must not be remote, 122
- for non-acceptance of goods, 180
- for non-delivery of goods on wrongful refusal or neglect of seller, 181
- for nuisance, measure of, 398
- for physical harm, 445
- for prevention of valuation by third party to fix price in contract of sale of land, liability of party in default to, 185 *n.*
- for preventing valuation to fix price of goods sold, 163
- for probable prospective breach of contract, 123
- for tort,
 - bankrupt's right to recover when passing to trustee, 366
 - claimable in fresh action on fresh loss, 373
 - claim under Lahds Clauses Consolidation Act, 1845, is not a claim for, 366
- for trouble and inconvenience to plaintiff, 123
- for wrongful dismissal of servant, 214
- for wrongful imprisonment, 444 *n.*
 - writ of *habeas corpus* sued out instead of, 444 *n.*
- given by statute, limitation of action for, 73
- independent tort-feasors can be sued separately for, 337
- injured workman cannot recover both compensation and, 458, 459
- in lieu of injunction,
 - when awarded by Court, 377
 - when not awarded by Court, 378
- in nature of interest above value of goods may be awarded by jury in trover, 415 *n.*
- interest as, when allowed by Court or jury, 117
- interest on bill of exchange, when recoverable as, 118

INDEX

Damages—*contd.*

- liquidated,
 - agreement as to, does not preclude
 - remedy of injunction, 139
 - specific performance, 139
 - ascertained sum payable for breach of promise of uncertain value treated as, 139
 - or penalty, decision with reference to intention, 137
 - or penalty, language immaterial in determination of, 139
 - recoverable in full, 137
 - loss caused by continuance or repetition of tort not adequately compensated by, ground for injunction, 374
 - measure of,
 - in action of
 - tort, 369
 - trespass to goods, 413
 - trespass when plaintiff deprived of goods, 412
 - trover when plaintiff not deprived of full value of goods, 414 *n.*
 - on breach of contract to lend or borrow, 201
 - nominal
 - or contemptuous, when awarded by jury in action of tort, 370
 - successful plaintiff in action for false imprisonment entitled to, 439 *n.*
 - costs on award of, 124
 - when awarded, 124
 - owner of dog liable in, for injury done to cattle, horses, etc., 359
 - payment of, under Employers' Liability Act, effect of, 452
 - pecuniary, action for, by person injured by tort, 369
 - physical harm in breach of statutory duty, liability of person causing to, 445
 - promise, breach of, giving rise to, construction of, 147
 - recoverable by agent for wrongful revocation of authority, 240
 - recoverable by principal for loss due to bribe to agent, 235
 - recovered against married woman in action of tort payable out of separate property not restrained, 348
 - recovered by personal representatives, between whom divided, 363
 - recovery of, for adultery, 1202, 1203
 - resale of goods, right of unpaid seller to recover, on, 179
 - seduction, for, 464
 - title of person claiming, not extinguished by limitation of action, 80
 - tort, for, separate rights for, where one act committing more than one tort, 373
 - unliquidated, assignability of right to sue for, 141
 - claim for, in respect of tort of bankrupt, when provable in bankruptcy, 367
 - right of retainer in, 1381
 - unpaid seller's right to, on resale, though original contract of sale rescinded, 179, 180
 - unreasonable award of, new trial of action when ordered on, 371, 372
 - when not recoverable, 1203
- Date, payments in discharge of debts applied by law in order of, 114
- Dearle v. Hall*, rule in, land, no application to, 760. *See also* "Trust, beneficial interest, successive alienations of."
- Death,
 - of person committing tort, action against personal representatives, when maintainable, 364, 365
 - extinguishment of liability by, 364
 - of person liable under Employers' Liability Act, claims extinguished by, 365 *n.*
 - under Workmen's Compensation Act, claims not extinguished by, 365
 - order of, no presumption as to, 4

INDEX

- Death—*conid.*
 presumption of, 4
 how rebutted, 4
- Debenture,
 contract to take up, may be specifically enforced, 201*n.*, 1013
 definition, 1006
 enforcement of, 1011
 floating charge, secured by, 1008
 foreclosure of, 1010
 irredeemable, may be made, 981
 mortgage, registration compulsory, 1010
 negotiable instrument, may be, 1012
 power to issue, 1008
 redemption of, 1012
 registration of, 1009
 transfer of, 1012
- Debenture stock,
 definition, 1007
- Debts,
 bond. See "Bond."
 charge of, upon real estate, 1393
 co-representative, liability of, for debts kept alive, 1384 *n.*
 may keep alive, 1384
 Crown debts, priority of, in administration, 1377
 definition, 985
 discharge of, liquidated by payment in satisfaction, 151
 pro tanto, by payment of lesser sum, 152
 due to plaintiff, payment of, improperly obtained from third party by defendant,
 319
 equitable, right of retainer in, 1381
 extinction of, surety discharged by, 298
 foreign judgment as evidence of, 323 *n.*
 gambling, security for, 313
 garnishment of, 1054
 bankruptcy of debtor, 1054
 what may be, 1055
 implied charge of, 1398
 interest on, when payable, 115
 contract to pay, may be inferred from course of dealing between parties,
 115
 may be inferred from custom or usage, 115
 interest under contract, may be recovered with or without principal, 116
 judgment, 986
 legal, right of retainer in, 1381
 Mercantile Law Amendment Act, and, 1384 *n.*
 of record in English tribunal, foreign judgment does not create, 323 *n.*
 order of payment of, out of legal assets, 1375—1377
 payment of, admission of assets by, 1419
 "contrary intention" explained, 1396
 order in which assets applied, 1391—1393
 out of assets of deceased, 1370, 1371
 out of insolvent estate, 1388
 out of "mixed fund" of real and personal estate, 1394
 out of specific legacy, 1395
 personal representative's liability for, 1418
 payments in discharge of, when appropriated by law, 114

INDEX

Debts—*contd.*

- personal representative's power to pay, 1411
 - right of preference, 1378, 1379
- priority of, against equitable assets, 1373
 - against legal assets, 1372
- purchase-money for outgoing partner's share is a, 288
- receipt of, out of profits, partnership not implied from, 264
- record of, what, 985
- representative can keep alive while vested, 1385
- simple contract, definition, 987
- specialty, nature of, 987
 - priority of, abolished, 990
 - what included in, 988
- statute barred, payment of, 1383
 - by one co-representative, 1383
- statutory preference given to, 1377
- statutory, rank as specialties, 988
- testamentary direction for payment of, effect on husband's curtesy, 1316
- title of person claiming, not extinguished by limitation of action, 80
- trust for payment of, effect of, 1385

Debtor,

- appropriation of payment by, when several distinct debts owing, 113
- assignment of right against, not complete till notice, 142
- defences of, against assignee, 142, 142 *n.*
- discharging liability before notice of assignment, effect of, 142
- performance of contract,
 - representatives of, 110
 - servant or agent of, 110
- receiving order against, effect of, on creditor's right to sue, 149
- representatives of, defences open to, 116
- whether entitled to notice of, 115

Debtor devisee, 1276

Debtor legatee, 1276, 1281

Deceased,

- burial of, 1402
- cremation of, 1402
- custody of body of, 1402
- inventory of estate of, 1402
- mourning garments for relatives of, 1402

Deceased wife's sister, marriage of, 1173

Deceit,

- action for,
 - essentials of, 536, 538—540
 - history of, 536—538 *n.*
 - matter of fact alleged, 538
 - motive of false statement immaterial, 540
 - plaintiff not bound to investigate truth, 541
 - plaintiff's wrong no defence, 542
 - statement acted on by plaintiff, 540
 - statement by agent, 542
 - statement believed by plaintiff, 539
 - statement, how made, 540
 - statement must have been intended to influence plaintiff, 539
 - statement must have been wilfully untrue, 539
 - statement to plaintiff, 538
 - statement subject to requirement of writing, 541

INDEX

- Deceit—*contd.*
 action for—*contd.*
 truth, discovery of, by defendant, 543
 bailee obtaining possession by, intending to misappropriate, guilty of larceny, 409 *n.*
- Declaration of title, proceedings for, 650, 651
- Decree absolute,
 marriage after, 1196
 refusal of, on ground of collusion, 1192
 time for making, 1191
- Decree *nisi*, 1186, 1191
- Deed,
 claim to recover money upon, barred by period of twenty years, 72
 executed in own name, liability of agent for, 61
 person not liable on, if not named as party in, 62
- Defamation,
 action for,
 agent, privilege for statement by, 520
 apology, plea of, 520
 blasphemous matter not privileged, 513
 common interest privilege, 517—518
 corporation liable to, 521
 Court and jury, functions of, 506, 508, 510, 519
 damage in fact, when essential, 503
 damages, measure of, 521
 damages, mitigation of, 521—523
 excuse for publication, 506
 fair comment, defence of, 509
 harmful statement, not for, unless defamatory, 510
 history of, 501—503 *n.*
 intention to defame not essential, 501
 “interest or duty,” examples of, 527—528
 ignorance of plaintiff's existence, no defence, 506
 innuendo, examples of, 524—525
 innuendo, what is, 500
 judicial privilege, 512
 justification, extent of, 511
 malice, absence of, in mitigation of damages, 522
 malice defeats privilege, 514—519
 malice, effect in, 509—510
 malice not essential in, 502
 matters of public interest, what are, 525—526
 military privilege, 513
 parliamentary privilege, 511, 512, 513, 514, 515
 payment into Court by defendant, 520
 political privilege, 513
 press privilege, 513, 515—516
 privilege, absolute, 511—513
 privilege for agent's statements, 520
 privilege, qualified, 514—519
 professional privilege, 517
 proof of malice, 335 *n.*
 provocation, as mitigation of damages, 522
 publication, what is, 505, 506
 recovery of damages *aliunde*, 523
 remedies in, 500

INDEX

Defamation—*contd.*

action for—*contd.*

- repetition of slander does not make original utterer liable, 507
- rumour, no justification, or mitigation, 522
- self-defence privilege, 519
- slander, prescription in, 523 *n.*
- wife, cannot claim for loss of husband's society, 523

Default, death of person caused by, right of personal representatives to sue party liable for, 362, 363

Delivery

- as escrow, of specialty contract, 97
- consignee failing to accept, effect on liability of common carrier, 251
- delay in, arising from causes beyond control of common carrier, 251
- essential for gift of chattel, 939
- failure of buyer to accept, liability to seller on, 173
- longi manu*, 923
- of chattels, nature of, 921
- of goods, after death of partner, liability of personal representatives for, 269 *n.*
 - at risk of seller, 171
 - by common carrier must be in their reasonable time, 250—251
 - by instalments, buyer not bound to accept, 170
 - by stated instalments, breach of contract for, 170
 - delayed by fault of party, risk of party defaulting, 167
 - demand of, must be made at reasonable hour, 113, 169
 - duties of common carrier as to, 250
 - duty of seller as to, 168
 - examination by buyer on, 172
 - for transmission to bailee by unpaid seller, loss of lien by, 175
 - larger in quantity than contracted for, 169
 - less in quantity than contracted for, 169
 - mixed with goods not contracted for, 169—170
 - part, right of stoppage *in transitu* after, 177
 - payment of price, and, concurrent conditions, 168
 - place of, 168
 - contract for sale of specific goods, 168
 - refusal of buyer to accept, rights of seller on, 173
 - risk of seller until, 167
 - risk of buyer when property is transferred, 167
 - tender of, must be made at reasonable hour, 113, 169
 - time of, where goods in possession of third person, 169
 - time of, where no time fixed in contract, 168
- to buyer,
 - before contract avoided in default of valuation to fix price, 163
 - or agent before arrival at appointed destination, transit ended by, 176
- to carrier,
 - by seller at own risk, where goods not insured, 171
 - buyer may decline on loss or damage, 171
 - effect of, 170—171
 - transit begun by, 176
- to third person with intent to pass ownership or possession amounts to conversion, 416
- when no place appointed under contract, 112, 112 *n.*
- wrongful neglect or refusal by seller to give, action by buyer for damages, 181
 - measure of damages, 181
- under contract of sale of value of 10 pounds or upwards, 99—100

INDEX

Delivery—*contd.*

- of possession, ordered by Court, 329
- of specialty contract
 - by declaration of intention, 96, 97
 - by transfer of possession, 96—97
- part, lien of unpaid seller on, 175
 - waived by, 175
- reasonable hour for, what is, a question of fact, 113
- request for, whether necessary before taking chattels by force, 436 *n.*
- seller's duty as to, under contract of sale of goods, 163
- taken from carrier by buyer or agent ends transit, 176
- time of payment independent of, action for price when, 180
- writ of, 379 *n.*
- wrongful refusal by carrier or bailee, transit ended by, 177

Dependants of deceased workman entitled to compensation, who are, 462

Deposit. *And see* "Deposittee."

- as security for loan, 206
- contract of, defined, 203
- of money as stake
 - with stakeholder, recovery of, 310
 - with other party, recovery of, 310
- of securities as "cover" by party to wager, recoverable, 311
- reasonable care and skill in regard to, what is, dependent on circumstances, 203

Deposittee,

- duty of,
 - to allow depositor to take possession of thing deposited, 204
 - to deal with thing deposited in manner authorised by depositor, 204
 - to exercise reasonable care and skill in regard to deposit, 203
- estopped from denying his depositor's title, 204 *n.*
- evicted by title paramount, good defence against depositor claiming re-delivery, 204 *n.*
- for reward, duty to exercise
 - skill of prudent man, 203
 - special skill, 203
- gratuitous,
 - finder of goods bound to exercise same care as, 205
 - skill to be exercised by, 204
- interpleading, in case of disputed title, 204 *n.*
- lien of, for charges,
 - in case of wharfinger, 205
 - in case of bankers, 205
- professing particular trade, skill to be exercised by, 204
- retention of deposit by, as against depositor, when justified, 204 *n.*

Depositor, right of, to resume possession of thing deposited, 204

Depreciatory conditions, sale by trustee under, 1128

Derelicts, differ from wreck, 700 *n.*

Description, goods bought by sample and, 165

Desertion,

- definition of, 1189
- divorce in relation to, 1188
- judicial separation granted for, 1193
- "protection order" granted for, 1199

Design,

- assignment of registered, 1023
- Crown and, 1023

INDEX

- Design—*contd.*
 definition of registered, 1020
 disclosure of, 1020 *n.*
 infringement of, 1021
 inspection of, 1021
 must be shown, 1022
 penalty for infringement of, 1022
 registration of, 1021
 "threats actions" and, 1023
- Detinue,
 action of,
 against person unlawfully refusing to deliver up goods of another, 422
 by co-owner for, without joinder of other co-owners, 349 *n.*
 by finder of chattel, 424
 for chattels found on land by occupier, 424
 history of, 422 *n.*
 jus tertii as defence to, 425
 nature of, 422 *n.*
 plaintiff in, must have sufficient interest to entitle him to possession,
 423
 possession of goods parted with no defence to, 424, 425
 refusal to give up goods constitutes offence in, 422
 defined, 422
 judgment in, effect of, 425
- Devastavit,
 action for damages in respect of, 1421
 personal representative's liability for, 1420
- Devise,
 definition of, 1261 *n.*
 estates tail, of, 1289
 general, definition of, 1265 *n.*
 implied, 1263 *n.*
 in common, 1288
 interest on, 1270
 issue of testator, to, 1287
 joint, 1288
 lapse of, 1287
 moral obligation fulfilled by, 1289
 personal representative's assent to, 1268, 1269
 residuary, 1267
 specific, definition of, 1264, 1265 *n.*
 testator's power to, 1261
 title of beneficiary, 1267
 voidance of, for insufficient description of beneficiary, 1262
- Devisee
 in trust, acknowledgment of debt by, 1385
 liability for
 covenants running with the land, 1363
 obligations to tenant, 1364
 purchase from, 190 *n.*
 right of retainer, 1380 *n.*
- "Die without issue." See "Dying without issue."
- Dignities considered as incorporeal hereditaments, 16
 as things real, 15
- Diligence, standard of, 331
 occupier of defective premises, 332

INDEX

- Diligence, standard of—*contd.*
 person delivering dangerous goods, 331
 person keeping or using thing likely to cause injury unless managed with special care, 333
 person professing special skill, 331
- Disbursements, deduction for, in account by agent, 234, 234 *n.*
- Discharge
 of bankrupt, effect on creditor's right to sue, 149
 of co-promisors on performance by one, 154
 of negotiable instruments, 145
 of rights of action
 arising out of contract
 by accord and satisfaction, 150, 151
 by judgment, 152
 by lapse of time, 152
 by payment in satisfaction, 151, 152
 by release, 150
 by judgment recovered in course of law, 152
 by payment to one of joint promisees, 157, 158
- Discharge of contract,
 by agreement,
 subsequent, 144, 145 *n.*
 substituting new contract, 144, 145 *n.*
 when one party has performed, 145
 by alteration of a written instrument, 148, 149
 by bankruptcy, 148, 149
 by breach of condition, 146
 by condition subsequent, 145, 146
 existing rights not affected, 145, 146
 by failure to perform within reasonable time, 148
 by merger, 148, 149
 by operation of law, 144
 by oral agreement, 145
 by performance, 144
 by renunciation, 144, 147
 election to treat default as, non-exercise of, 147
 written, by material alteration without consent of promisor, 149
- Disclaimer
 cause of forfeiture, 549
 effect of, 812
 in bankruptcy, 860—4, 970
 of powers of appointment, 871
 tenant, by, effect of, 864
- Disclosure
 by agent to principal, 231
 onus of proving, 231
 by creditor to surety, 293
 of all material facts by insured, 305
- Discretion,
 age of, in males and females, 441 *n.*
 wrongful exercise of, by servant, liability of master for, 352
- Dispossession. *See* "Ejectment."
- Dissolution of partnership,
 accounts on, rules as to, 288, 289
 by charge of partner's share for separate debt, 282
 by death or bankruptcy of any partner, 281, 282

INDEX

Dissolution of partnership—*contd.*

- by illegality, 282
- date of, when notice given to dissolve, 281
- decreed by Court
 - on breach of partnership agreement by partner, 283
 - on incapacity of partner, 282, 283
 - on lunacy of partner, 27, 282
 - on misconduct of partner, 283
 - when business can only be carried on at a loss, 283
 - whenever just and equitable, 283
- distribution of assets on, 285
- notice of, by partners, 284
- on expiry of term fixed, 281
- on partner giving notice of intention to dissolve, 281
- on termination of adventure or undertaking, 281
- return of premium on, 286
- winding-up on, 284, 285

Distress. *See also* "Reversion, incidents of."

- barred by limitation of action, 72, 72 *n.*
- by person injured by tort, 369
- "damage feasant," seizure for, when exercisable, 84
- for rent,
 - exemptions from seizure under, 972 *n.*
 - general rule of, 972
 - goods distrained deemed still to be in possession of owner for purposes of action for trespass, 408 *n.*
 - trespass *ab initio* on, 384 *n.*
- malicious, action for, 494
- proper remedy for trespass by domestic animals, 361
- recovery of rent by, limited to period of six years' arrears, 80
- removal to avoid, 83 *n.*, 973 *n.*
- right extended to rent-chargers, 973 *n.*
- tithe rent-charge recovered by, 80 *n.*
- unlawful interruption of, rescous, 534
- when exercisable, 82—83
- wrongful,
 - action for excessive or irregular, 532, 533
 - illegal, double damages for, 533, 534, 535
 - trespass *ab initio*, 533
 - action of replevin for, 413 *n.*
- wrongful interference with goods seized under, common law remedies for, 411 *n.*

Distringas,

- modern form of, 982 *n.*
- notice in lieu of, 1056

Disturbance, public, arrest for, when justified, 437 *n.*

Divorce,

- a mensâ et thoro*, 1187
- a vinculo matrimonii*, 1187
- bars to,
 - absolute, 1189, 1190
 - discretionary, 1190, 1191
- decree absolute, time for making, 1191
- decree *nisi*, 1186, 1191
- domicile in relation to, 1203
- dower, effect on, 1323

INDEX

Divorce—*contd.*

- effect of, on custody of children, 1221, 1222
- effect on succession, 1315
- grounds for,
 - by husband, 1186, 1187
 - by wife, 1187
- husband and wife cannot sue one another for torts committed before, 349 *n.*
- judicial separation followed by, 1189
- King's Proctor's intervention in proceedings for, 1192
- maintenance after, 1199, 1200
- refusal of, on ground of collusion, 1192

Documents,

- agent must produce, for inspection, 233
- constituting contract, sufficiency of date of, 102
- containing terms of contract need not have been made for purposes of evidence, 101
- contract gathered from several, 101
- letter and envelope together treated as one, 102
- oral evidence admissible to connect, 102
- sufficiency of signature on, when contract gathered from several, 101

Documents of title to goods, effect of transfer on rights of unpaid seller, 178, 179

Dog,

- destruction of, for trespassing upon land, when justifiable, 361
- injury done by, to cattle, horses, etc., owner liable for, 359
- owner of, occupier of house keeping, deemed to be, 359 *n.*
- person keeping, not liable for damage committed by, unless *scienter* or negligence proved, 360
- savage, kept in defence of property, justifiable, 445 *n.*

Domestic relationship, contract of service not presumed from, 207

Domestic servant,

- determination of engagement of, by paying or tendering month's wage in lieu of notice, 211, 212
- engagement of, determinable on month's notice, 211, 212
- not "workman," 225

Domicile,

- abandonment of, 4
- acquisition of, by person of full legal capacity, 2
- change
 - by guardian, of ward's, 3
 - of, by lunatic, 2
 - of, by minor, 4
 - of, by person of full legal capacity, 2
- devolution of personal estate affected by, 1306
- interpretation of term, 2 *n.*
- jurisdiction of the Court relating to, 1203—1204
- legitimacy in relation to, 1206
- of corporations, 7
 - when trading, 7
- of illegitimate minors, 3
- of legitimate minor, 3
 - when orphan, 3
- of married woman, 3
- of origin acquired by abandonment of present, 4
- persons cannot have more than one, at same time, 2
- retention of, by persons in naval or military service of Crown, 2

INDEX

Domicile—*contd.*

wills, law of, in relation to, 1241, 1242, 1243

Dominant tenement. *See* "Incorporeal hereditaments."

Dominions, copyright in, 1043

Donatio mortis causa, 1290

chose in action as subject of, 1292

death of donor of, effect of, 1294

delivery necessary in, 1291

delivery of evidences of title in, 1293

donee, to, as trustee, 1294

intention of, 1290

liability of, for payment of debts, 1393

Double possibilities, rule of,

chattels, not applicable to, 661 *n.*

cy-près doctrine and, 660

equitable interests, 751 *n.*

executory interests, applicable to, 661 *n.*

stated, 660

Double value. *See* "Holding over."

Dovecote, lord of manor may erect, 690

Dower,

addition to widow's claim

against husband's estate, 1325

under Intestates' Estates Act, 1325

agreement not to bar, 1325

assignment of, 1319

claim of,

bars to, 1321—1324

in copyhold, 1319 *n.*

satisfaction of, 1319

time for, 1320

claims prior to, 1324

incorporeal hereditaments, liability to, 1319 *n.*

interest of joint tenant not subject to, 1319 *n.*

legacies not a bar to, 1325

rights and liabilities of doweress, 1320

widow's claim to, against adverse possessor, 1318 *n.*

widow's right to, 1318

Doweress,

leases by, under Settled Estates Act, 896

not protector of settlement, 566

rights and liabilities of, 1320

Drunken person,

alienation of chattels by, 977

conveyances of, 917

contracts and conveyances of, 28

Duress, declaration of intention induced by, revocable, 34

Duty. *See also* "Statutory duty," money paid under, recoverable, 321

absolute, imposed on employer by common law or statute, not discharged by employment of independent contractor, 354

absolute statutory, employer guilty of personal negligence on breach of, 449

act done in obedience to more pressing, amounting to justifiable negligence, 335

arising out of contract unassignable, 143

breach of, by agent, commission due forfeited by, 236

official, money payable by, enforcement of obligation as to, by action, 323,

324

INDEX

Duty—*contd.*

upon employer for reasonable skill and care in performance of particular work,
liability for breach of, 354, 355

Dyers, lien, general, none, 962 *n.*, 963 *n.*

"Dying without issue,"

construction of, in devise, 665

destruction of limitation over, 666

meaning of, 1273

Earnest,

damages, estimation of, must include, 136, 137

deposit by purchaser on sale, counts as, 136

forfeiture of, on failure to perform, 136

given on making of contract,

evidence of conclusion of, 136

security for performance, 136

part payment, treatment of, as, on performance, 136

return of,

on failure to perform, 136

on performance, 136

Earnings

of servant, right of master to, 209

right of master to, when servant acting as agent, 209 *n.*

Easements,

definition of, 704

distinguished from other rights, 705 *n.*

included in "land," 18

interference with, amounting to nuisance, 391, 403

negative, 705

not in gross, 679

nuisance committed by exercise of right of, justified, 395 *n.*

positive, 705

private, trespass to land committed in lawful exercise of, justifiable, 386

recognised (list of), 705

Education, liability for, of children, 1213, 1214

Ejectment,

action for,

against mere trespasser, 390

by person entitled to *interesse termini*, 388 *n.*

damages for dispossession recoverable in, 388

defences to, 389

history of, 388 *n.*

jus tertii as defence to, 389

onus probandi in, 389

estoppel of lessee or licensee from denying title of plaintiff in ejectment to
grant lease or licence, 390

of trespasser,

assault or battery justified on ground of, 435

on land, 382, 383

on land by force, 435, 435 *n.*

possession for statutory period sufficient title to recover in, 389 *n.*

recovery of possession and mesne profits by co-owner by action in nature of,
388, 389

right of person entitled to immediate possession of land to, 388

Election, equitable,

creditor of testator, by, 1281

INDEX

- Election, equitable—*contd.*
 - implied, 1280
 - terms of, 1279, 1280
 - wills, under, 1278, 1279
- Elegit,
 - interests seizable under, 863 *n.*
 - not applicable to chattels, 971 *n.*
- Emblements,
 - definition of, 575
 - personal estate, pass to personal representative as, 1355
 - tenant for life and, 575
 - tenant at will and, 646
 - tenant for years and, 623, 624
- Employee,
 - breach of confidence by,
 - damages for, 222—223
 - injunction to restrain, 222, 223
 - duty of, to perform work in manner and time agreed, 222
 - duty of employer to provide employment for, a question of fact, 222
 - duty to use reasonable care, diligence and skill, 222
 - injury received by,
 - due to defective by-law or rule of employer, 448
 - due to negligence of person controlling signals, etc., 448
 - in course of common employment, when employer liable for, 446, 447, 448
 - when conforming to orders of person authorised by employer, 447, 448
 - lien of,
 - dependent on possession, 223, 224
 - on chattel, 243
 - not owned by employer, 223 *n.*
 - when agreement to give credit after completion of work, 224
 - right of, to payment for work actually done, 224
 - though not completed, 224
 - rights of, 223, 224
- Employer. *See also* "Employers' Liability Act."
 - action against, for injury to workman, when maintainable, 446, 447, 448
 - agreement by, to do whole work for lump sum, 224 *n.*
 - bankruptcy of, rights of workman on, 461
 - breach of absolute statutory duty of, for protection of employee, 449
 - compensation payable by,
 - in respect of personal injury to workman by accident, 455
 - to workmen suffering from industrial disease, 456
 - corporate or unincorporate body may be liable as, for compensation to workmen, 456
 - defective notice of accident, 459
 - duty of,
 - to provide employment for employee, 222
 - to render reasonable reward where amount not fixed, 222
 - to render reward agreed, for work done, 222
 - exemption from liability of, for workmen's compensation by contract, 460
 - indemnification of, on payment of compensation by third person liable in damages for injury to workman, 458
 - liability of,
 - for breach of duty, 354
 - for negligence on part of contractor or servants when independent contractor employed to do lawful act, 355
 - when work commissioned unlawful, 354

INDEX

Employer—*contd.*

- liability of—*contd.*
 - with independent contractor for wrongful acts of contractor or servant, 355 *n.*
 - meaning of, 225 *n.*
 - member of family of, and Workmen's Compensation Act, 458
 - negligence, personal, of, 449
 - in associating employee with persons of less than ordinary skill or care, 449
 - in causing injury to employee by taking part in work, 449
 - not generally liable for improper performance of work by independent contractor, 354
 - person letting or borrowing services of workman liable as, for compensation to workman, 456
 - personal representative of deceased, liable for compensation to workman, 456
 - responsibility of, employment of independent contractor, 354
 - sued under Employers' Liability Act, defences open to, 450
 - taking part in or interfering with performance of work, effect of, on liability of, 354
 - under Workmen's Compensation Act, who may be, 456
 - workman failing to give information of defect or negligence causing injury to, effect of, 450
- Employers' Liability Act. *See also* "Workmen's Compensation Act."
 - claims under, extinguished by death of person liable, 365 *n.*
 - contributory negligence a defence to employer sued under, 450
 - damages, amount of, recoverable by or in respect of workman under, 451, 451 *n.*
 - damages under, assessment of, 452
 - payment of, effect of, 452
 - injury causing death of party injured, liability under, 364
 - limitation of action under, 453
 - suit in respect of same injury not maintainable under Workmen's Compensation Act, 451
 - volenti non fit injuria* as a defence, 450
 - workman failing to give information about defect or negligence causing injury, 450
- Employment, profits by agent in sole employ outside course of, belong to principal, 235
- Endowments, amount recoverable under, 306
- Enfranchisement. *See also* "Copyhold."
 - statutory power of tenant for life to effect, 880
- Entail. *See* "Estate tail."
- Entertainments, unlicensed, maintenance of, a nuisance, 404
- Entireties, tenancy by, effect of Married Women's Property Acts on, 1087 *n.*
- Entry,
 - forcible,
 - assault committed in course of, liability for, 383
 - possession of land obtained by, 383
 - lessor by, terminates tenancy at will, 644
 - on land, by person entitled to immediate possession, 383
- Equitable contingent remainder, abeyance of seisin, none, 752
- Equitable execution. *See* "Receiver, appointment of."
- Equitable interests in land,
 - escheat of, 753

INDEX

- Equitable interests in land—*contd.*
 - history of, 748 *n.*
 - incidents of tenure do not affect, 752
 - legal estate,
 - may be postponed to, 760
 - owner cannot affect, 754
 - similarities, 750
 - life interest in leaseholds, 752 *n.*
 - merger of, in legal estate, 753
 - nature of, 748
 - notice, what is, 758, 759
 - order of priority, 760
 - possession, do not confer, 754
 - sources of, 749
 - technical words, and, 753, 754 *n.*
 - title deeds, do not pass with, 760
 - unenforceable against *bonâ fide* legal purchaser, 755
- Equitable rights, general position of, 935
- Equitable waste,
 - tenant in fee simple and, 558
 - tenant in tail and, 563
- Equity,
 - Courts of, actions in, concerning contracts or equities affecting lands situate abroad, 339 *n.*
 - liability of minor in, to restore property obtained by false representation, 348
- Equity of redemption. *See also* "Mortgage."
 - nature of, 749
 - purchaser of, liable to indemnify vendor from mortgage debt, 317 *n.*
 - real estate, how passing on death, 1354
- Escheat,
 - claim to,
 - by Crown in relation to payment of deceased's debts, 1327 *n.*
 - mesne lord, 1327 *n.*
 - estates tail in relation to, 1326 *n.*
 - fee simple, of, 1326
 - grant by Crown subject to inquisition, 1327
- Estate at will,
 - alienation, effect of, 647
 - creation of, 640, 641, 642, 643
 - definition of, 640
 - determination of, 644
 - features of, 640 *n.*
 - no fealty in, 549
 - notice to determine unnecessary, 645
 - rent may be distrained for, 645
 - tenant's rights, 646
- Estate for life,
 - definition of, 572
 - determinable, 581
 - devise of, 572
 - estovers, right of, 574
 - forfeiture of, 577
 - inalienable, may be made, 577
 - limitation, method of, 572
 - rights of tenant of, 573, 574, 575

INDEX

- Estate for years,
 - alienation, condition against, 627
 - breach of, 630
 - relief against, 630, 631
 - alienation of, 626
 - assignee, liability of, 632
 - condition of re-entry in lease, 633
 - contingent, 615
 - covenants and conditions running with the land, 628
 - definition of, 608
 - "demise" implied covenant from, 635 *n.*
 - by, 608, 609
 - ejectment, when lawful, 633
 - entry, when necessary, 608
 - forfeiture by desertion of premises, 633
 - forfeiture of, 632
 - form of lease, 615
 - holding over, after notice, 634 *n.*
 - lessor, when bound to repair, 637
 - merger of, by surrender, 627
 - no compensation for improvements, 625
 - option to determine, 620
 - original lessee, liability of, 632
 - quiet enjoyment, liability of lessor for, 634, 635
 - "quiet enjoyment," what is, 635 *n.*
 - renewal of, covenant for, 616
 - extent of, 617
 - rent annexed to estate, 621
 - rent apportionable, 622
 - rent on, 620
 - rent, when payable, 622
 - repair, lessor not bound to, 637
 - reversionary grant of, 613
 - reversion on, severance of, 628 *n.*
 - sub-demise of, 626
 - summary recovery of possession, 634
 - surrender of, 627
 - tenant, rights of, 623
 - term, commencement of, 613, 614
 - use, by way of, 608, 609
 - warranty of fitness, when, 636
 - waste by tenant, 625
- Estate in possession, liabilities of, 549
- Estate *pur autre vie*, 1303
 - corporation may hold, 573
 - curtesy, in, 1313 *n.*
 - definition of, 572
 - devolution of, 1312
 - incorporeal hereditaments, in, 672 *n.*
 - limitation, method of, 572
 - personal representative in relation to, 1353 *n.*
 - presumption of death of *cestui que vie*, 582
- Estate tail
 - after possibility, etc., 563
 - barring of, 563
 - cannot be prevented, 564

INDEX

Estate tail—*contd.*

- base fee,
 - created from, 564
 - how enlarged, 569
 - no merger of, 570
- confirmation of voidable conveyance of, 571
- contract to disentail, effect of, 570
- covenant to settle, not caught by, 570
- definition, 561
- descent of, 571
- devise of, 570, 1289
- equitable, how barred, 752 *n.*
- escheat, in relation to, 1326 *n.*
- female, words of limitation, 561, 562
- general, words of limitation, 561
- kinds of, 561
- limitation after, not within rule against perpetuities, 1078
- limitation of actions as against persons liable to be barred by tenants of, 78
- male, words of limitation, 561, 562
- merger of, none, 553 *n.*, 570
- personal representative in relation to, 1261 *n.*
- protector of settlement,
 - alien must be, 30
 - appointment of, 566, 567
 - consent of,
 - irrevocable, 568
 - how given, 568
 - when given, 567
 - when a convict, 567
 - when a lunatic, 566
 - who is, 30 *n.*, 565
 - who is not, 566
- seizable for debt, 863
- special, words of limitation, 561, 562
- tenant in, rights of, 563
- unenrolled conveyance of, 570

Estoppel,

- agency, by, 233
- deed, by, 810
- of lessee or licensee, 390
- parties bound and entitled, 811
- tenure, by, 549, 550 *n.*, 552

Estovers,

- common of, 721
- incumbent of living and, 575
- tenant at will and, 646
- tenant for life and, 574
- tenant for years and, 623

Eviction of possessor of land by wrong-doer, 383

Evidence,

- contradicting express terms of written document not admissible, 62
- documents containing terms of, need not have been made for purposes of, 101
- oral, admissible to
 - connect documents, 102
 - identify consideration, 101
 - parties to contract, 101

INDEX

- Evidence—*contd.*
 oral, admissible to—*contd.*
 identify subject-matter of contract, 101
 proof by, of contract required to be in writing, 98—99
 sale of, not necessarily enforceable, 40, 40 *n.*
 Exception in deed construed against grantor, 813
 Execution. *See also* "Chattels corporeal."
 against one on judgment obtained against co-promisors, 155
 against partnership property for debts of partner, 276
 excessive, action for, 494
 interest on judgment may be levied under writ of, 117
 malicious, action for, 494
 Executor. *See also* "Personal representative."
 acceptance of office, 1333
 cannot renounce after, 1334
 acknowledgment by one, effect on limitation of action, 75
 appointment of, 1330
 bankruptcy of, 1331
 capacity to act, 1331
 consent of all, in disposition of estate, 1407
 corporation as, 1332 *n.*
 definition of, 1329
 devolution of executorship, 1335
 funeral arrangements carried out by, 1402
 general, appointment of, 1332
 gift to, 1285
 identity of, doubt as to, 1331 *n.*
 infant, power of Court in relation to, 1331
 lunatic, power of Court in relation to, 1331
 minor may be, 25
 negligence of, does not give rise to action of tort, 335 *n.*
 office of, not assignable, 1335
 probate granted to, 1333 *n.*
 promise by, to answer damages out of own estate, 97—98
 Public Trustee as, 1336
 refusal of office of, 1332, 1334
 renunciation of probate by, 1334
 retraction of, 1334
 sale of real estate by, for payment of debts and legacies, 1409
 special, appointment of, 1332
 title of, 1346
 trespass to goods of deceased, action for, when maintainable by, 410
 Executor *de son tort*,
 authority of, 1344
 definition of, 1330, 1342
 letters of administration, not compelled to take out, 1345
 liability of, 1343, 1344
 enforcement of, 1345
 retainer, no right of, 1379
 statutory, 1343
 validity of acts of, 1344
 Executory interest. *See also* "Future interests in land."
 Executory interest in land,
 definition of, 663, 664
 history of, 664 *n.*
 limitation of, 664

INDEX

- Executory settlements, rule against perpetuities, and, 1078
Executory trust, special rule of descent, and, 751
Exoneration, proceedings for, may be commenced by surety against co-sureties before payment, 297
Explosive, harbouring or exposing of, a nuisance, 402
Extent, Crown, for debts, 864 *n.*
- Fact, mistake of. *See* "Mistake."
Factors
 "general agents" for employers, 55
 lien of, 961
 "Failure of purposes," settlement *inter vivos*, in case of, 1359
Fairs and markets (franchise),
 disturbance of, 694
 monopoly, not in all cases, 693
 nature of, 692
 pie-powders, court of, 692
 site, change of, 693
 tolls in, 692, 694
False imprisonment,
 action for, is an action of trespass, 439 *n.*
 successful plaintiff in, entitled to nominal damages, 439 *n.*
 appreciable damage in fact need not be proved in action for, 326
 by act of third person, when defendant liable for, 440, 440 *n.*
 contact, actual, with body of plaintiff not necessary to constitute, 439
 defendant when liable in action of, when actual imprisonment by third party, 440, 440 *n.*
 defined, 439
 justification for,
 arrest by bail, 441
 authority of father or lawful guardian, 440
 justification for assault generally is, 443
 military authority, 442 *n.*
 suspicion of felony, 441
 limitation of action for, 73
 mistaken *bonâ fide* belief as to facts no defence to action for, 443
 remedies for,
 civil action for damages, 444 *n.*
 writ of *habeas corpus*, 444 *n.*
 superior force or show of authority submitted to by plaintiff, 439
Fatal Accidents Act, 1846,
 action based on, common employment no defence to, 448 *n.*
 claims under, estimate of damages in, 371 *n.*
Father, restraint upon body of infant by, 440
Fealty, oath of, when due, 549
Fee simple. *See also* "Quasi-fee simple."
 alienation by tenant in, 558
 conditional merger of, 652 *n.*
 contract to sell, implied, 186, 557
 corporation, limitation to, 556
 creation of, not possible, 554 ..
 definition of, 554
 determinable, 559
 reverter on, 652
 devise of, 555
 inalienable, cannot be made, 558, 559 *n.*

INDEX

- Fee simple—*cond.*
intermittent, not lawful, 560
no remainder after, 559, 655
presumption of, 557, 765
rights of tenant in, 557, 558
words of limitation, 555
- Fellowship, income of, alienable, 999 *n.*
- Felony,
action founded on, servant, death of, 477
assault or battery committed to prevent, justifiable, 437
causing death of deceased, personal representatives may sue in respect of, 363
may give rise to action of tort, 338
person injured by seeking civil redress, 338
suspicion of, arrest on,
by constable, 442
when justified, 441
- Fence
allowed to fall into dangerous condition a nuisance, 404
duty to repair, 714
- Feræ naturæ*, animals,
capture of, 936
frightening away, not actionable, 770
occupier's right to kill, 769
rent, cannot be distrained for, 972 *n.*
- Ferry (franchise),
bridge, and, 696
disturbance of, 695, 696
highway to highway, 695
nature of, 695
tolls for use of, 696
vill to vill, 695
- Fi. fa.*
binds only from lodging with sheriff, 971 *n.*
interests seizable under, 863 *n.*
on land to which public have access, detinue maintainable by, 424
possession of, when sufficient to support action of trespass by, 411
- Finder of chattel,
action of detinue by, 424
action of trover by, 417
bound to take same care as gratuitous deposit, 205
compensation of, for expenses incurred, 205 *n.*
effect of finding, 923
liability of, to owner, 417
lien of, for expenses incurred, 205 *n.*
- Fire insurance,
application of money payable under, in rebuilding, 306
insurable interest in contract of, time of existence of, 304
- Fire, trespass to land to prevent spread of, justifiable, 386
- Firm. *See* "Partner," "Partnership."
- Fishery, common of, definition, 720
- Fishery free (franchise). *See also* "Insurance."
bed, change of, 702
cannot now be created, 700
distinction between and "several fishery," 701 *n.*
nature of, 700
property in the soil, 701 *n.*

INDEX

- Fishery, several,
 - change of bed, 720
 - definition, 719
 - includes ownership of soil, 719
- Fishing, right of, kinds recognised, 719
- Fixtures,
 - agricultural holding on, 788
 - cannot be distrained, 972 *n.*
 - execution creditor and, 788
 - included in land, 17
 - personal estate, pass to personal representative as, 1355
 - tenant for life and, 788
 - tenant for years and, 788
 - what are, 17, 17 *n.*
- Fledgelings, property in, 770
- Floating charge. *See* "Debenture."
 - void in liquidation, when, 1072
- Flotsam,
 - nature of, 700 *n.*
- Foldage, right of, definition, 718
- Football player, professional, is a "workman" under Workmen's Compensation Act, 458 *n.*
- Forbearance as consideration, 94, 95
- Force,
 - actual and direct application of, to body of plaintiff in action for battery, 324
 - amount necessary in self-defence, 82
 - application of, direct effect of intervention by third party, 432
 - applied through instrument, animate or inanimate, battery constituted by, 432
 - chattels may be seized by person entitled, 82
 - chattels taken by, when defendant entitled to possession of, 436, 436 *n.*
 - whether request for delivery necessary before, 436 *n.*
 - churchwarden not justified in employing, to exclude person from church, 435 *n.*
 - effect of, on validity of will, 1258
 - ejection of trespasser by, 435, 435 *n.*
 - employment of, in defence or assertion of possession of land or goods, 436
 - land may not be seized by, 82
 - money or goods obtained by, recovery, 319
 - reasonable, employed in self-defence, assault or battery justified on grounds of, 434
 - remedy of person dispossessed by, of chattels, 82 *n.*
 - superior, submitted to by plaintiff in action for false imprisonment, 439
- Foreclosure. *See* "Land, mortgage of, foreclosure."
 - pledgee of goods no right to, 955
- Foreign corporation,
 - actions by and against, 7, 8
 - powers of, 7
 - what is, 7
- Foreign currency, debt payable in, mode of calculation, 109—110
- Foreign judgment, amount recoverable on, mode of calculation, 110
 - action on, 322, 323
 - as evidence of debt, 323 *n.*
 - debt of record in English tribunal not created by, 323 *n.*
- ~~Not~~ enforceable, how, 990
- Foreign law, impossibility of performance of contract arising from, 129

INDEX

- Foreign Marriages Act, 1892..1168
- Foreign State,
 - torts of ambassador, minister or suite of, action for, when maintainable, 341
 - torts of ruler of, action for, when maintainable, 341
- Foreshore rights, customary, 747
- Forfeiture,
 - disclaimer, by, 549, 864
 - of earnest on failure to perform, 136
 - of interest in land, by breach of condition subsequent, 44, 50, 151
 - of interest in land, if assured to corporation, 10
 - of leases, 50
 - simony, by, 865
- Franchise,
 - alienation of, 684
 - considered as realty, 15
 - consideration necessary to grant of, 682
 - definition, 681
 - division of, 684
 - forfeiture for non-user or mis-user, 683
 - immunities from, 704
 - included in term "land," 18
 - offices in, 742 *n.*
 - owner of, entitled to goods, by, may bring trespass, 411
 - quo warranto*, and, 684 *n.*
 - scire facias*, and, 684 *n.*
 - special ownership in, 932
 - united to Crown, 683
- Frankalmoigne,
 - fee simple, gift in, 556
 - interest in land held by, included in realty, 15
 - no fealty in, 549
 - reversion of, to donor on dissolution of corporation, 13
- Fraud. *See also* "Deceit, action for," "Misrepresentation."
 - as defence to action on foreign judgment, 322, 323
 - "concealed," effect of, on limitation of action, 76
 - declaration of intention induced by, revocable, 34
 - effect of,
 - on marriage, 1176
 - on validity of will, 1258
 - money or goods obtained by, recovery of, 319
 - on creditors by matrimonial insurance, 307
 - specific performance refused on ground of, 126
- Frauds, Statute of. *See* "Statute of Frauds."
- Fraudulent preference,
 - definition, 1067
 - invalid against trustee in bankruptcy, 1066, 1067
 - liquidation of company, and, 1072
- "Freebench," claim to, in copyhold, 1319 *n.*
- Freehold,
 - covenant running with,
 - damages in respect of, 1362
 - how passing, 1362
 - implied undertaking to convey on sale of land, 186
 - subject to restrictive covenants, duties of purchaser of, 191 *n.*
- Freehold *in futuro*,
 - incorporeal hereditaments, of, 672 *n.*

INDEX

- Freehold *in futuro*—*contd.*
 unlawful, 654, 655
- Free warren (franchise),
 conveyance of, what it includes, 703
 nature of, 702
 not to manor as of course, 703
 property in franchise animals, 703
- Friendly societies,
 contracting out of liability of employer, sanctioned by, 460, 460 *n.*
 policies of insurance issued by, exempted from stamp duty, 304 *n.*
- Funeral expenses,
 liability of husband of deceased wife for, 318
 liability of personal representatives of deceased for, 318, 1402
- Future goods,
 sale of, when ownership passes, 945
 transfer of, 940
- Future interests in land, 648
 kinds of, 648
 rights of owners of, 650, 651
- Game. *See also* "Sporting, rights of."
 frightening away, actionable, 770
 property in, 932
- Gamekeeper,
 lord of hundred cannot appoint, 687
 lord of manor can appoint, 689
- Gaming,
 contract of insurance made by way of, void, 308
 contract of, recovery of money paid under, 313
 subscription to prize for lawful game is not, 311
 contracts by way of, null and void, 309
 transactions on Stock Exchange, 313
 unlawful, what is, 311 *n.*
 wagering distinguished from, 309 *n.*
- Garnishee order. *See* "Debts, garnishment of."
- Gavelkind,
 claims of dower in, 1324 *n.*
 curtesy by custom of, 1314 *n.*
 local custom, extent of, 1302
 socage interests subject to custom of, 1297
 widow's claim to dower, effect on, 1319 *n.*
- Gestation, period of, in relation to legitimacy, 1208
- Gift. *See also* "Devise," "*Donatio mortis causâ*," "Legacy."
 for past illegality or immorality, 42
 of property with restriction on remarriage good, 42 *n.*
 of realty with restriction on marriage with particular class good, 42 *n.*
- "Good" consideration under Act of 1571.. 1059 *n.*
- Goods. *See also* "Auction," "Chattels corporeal," "Lien," "Sale of goods."
 acceptance of, 99—100, 172
 after examination, 172
 before contract avoided in default of valuation to fix price, effect of, 163
 by conduct, 172
 by intimation, 172
 by retention without intimation, 172
 duty of buyer as to, 167

INDEX

Goods—*contd.*

acceptance of—*contd.*

prior to examination, 172

bailee of, liability of buyer or seller as, 167, 168

care and custody of, liability of buyer for, on failure to accept, 173

carriage of, 249

by common carrier outside professed limits, 250

by person not in capacity of common carrier, 259

dangerous, duty of disclosure, 259

duties of common carrier as to, 250, 251

gratuitous, liability for damage, 259

limitation of liability by railway and canal companies in respect of, 256, 257

claim for value of specific, passing to trustee in bankruptcy, proof in bankruptcy for, 367 *n.*

consigned by mistake, no liability incurred by consignee receiving, 205, 206

contract for sale of. See "Sale of goods."

not rescinded by exercise of unpaid seller's right of lien and stoppage *in transitu*, 179

contract to deliver specific or ascertained specifically enforceable, 125

conversion of,

action of trover for, 414

bonâ fide pledgee, when guilty of, 419, 420

by collection of cheque or bill by bank on behalf of person with no title, 416

by delivery to third person with intent to pass ownership or possession, 416

by destruction, 416

by pledgee, 416 *n.*

by pledging or charging, 416

by unauthorised user or consumption, 416

defendant's refusal to give up, when, 419

defined, 414

purchaser, *bonâ fide*, when guilty of, 419, 420

defined, 161

delay in carriage or delivery arising from causes beyond control of common carrier, 251

delivered after death of parties, whether representative liable for, 269 *n.*

delivery of,

and payment, concurrent conditions, 168

at risk of seller, 171

by common carrier must be within reasonable time, 250—251

by instalments, buyer not bound to accept, 170

by stated instalments, breach of contract for, 170

delayed, risk on party in fault, 167

duty of seller as to, 168

failure of buyer to accept,

repudiation of contract by, 173

right of seller on, 173

more or less than contracted for, 169

must be made at reasonable hour, 113

obtained by buyer or agent before arrival at appointed destination

transit ended by, 176

place of, 168

time of, where goods in possession of third person, 169

to carrier, 170—171

buyer may decline on loss or damage, 171

involving seas transit at seller's risk on failure to insure, 171

INDEX

Goods—*contd.*

- delivery of—*contd.*
 - to ship chartered by buyer, position of master, 177
 - when no place appointed under contract, 112, 112 *n.*
- demand of, must be made at reasonable hour, 113
- deposited for safe custody with innkeeper, 246
- deposited with stakeholder to abide event of valid transaction, recovery of, 320, 321
- deterioration of, in course of transit, risk on buyer, 171—172
- distrained for rent,
 - action of trover by owner of, against third party, 414 *n.*
 - owner still in "possession" for purposes of action of trespass, 408 *n.*
- document of title to, effect of transfer on rights of unpaid seller, 178, 179
- duty of seller to deliver, under contract of sale, 167
- entrusted for particular purpose, recovery of, before holder parting possession with, 321
- examination of,
 - by buyer, defects discoverable on, 166
 - by buyer on delivery, 172
- existing, 162
- finder of. *See* "Finder of goods."
- fraudulently or forcibly obtained, recovery of, 319
- further destination of, indicated by buyer to carrier, transit ended notwithstanding, 177
- future, 162
- handed to servant on behalf of master by third person in possession of servant, 408
- include all chattels personal other than things in action and money, 161
 - emblems, 161
 - things attached to or forming part of land, 161
- incumbrances, implied warranty as to freedom from, 165
- injured or lost by illegal act violating proprietary rights, action to recover damages for, 428, 429
- intended to be used for particular purpose, person delivering must notify to persons using dangerous qualities of, 331
- in transit, duration of. *See* "Transit."
- latent defects in, duty of lender of, to make known to borrower, 198
- legal restraint of, money paid or act done under threat of, indemnity for, 317
- loan of. *See* "Loan of goods."
- loss or damage to, whilst in custody of common carrier, 250
- lost or stolen whilst in possession of bailee, trover for, 420
- master leaving, in custody of servant, remain in possession of master, 408
- merchantable quality of, implied condition as to, 166
- mixed with goods not contracted for, rights of buyer on delivery of, 169—170
- non-acceptance of, damages for, 180
- non-delivery of, damages for, 181
 - measure of, 181.
- non-disclosure of character of, to carrier, effect of, 259, 260
- of another, unlawful refusal to give up, action of detinue for, 422
- of defendant, trespass to land to recover, when justifiable, 386
- of guest at inn, liability for loss or injury to, 244, 245
- part delivery of, to buyer or agent, stoppage of transition of remainder, 177
- parting with possession of, no defence to action of detinue, 424, 425
- patent name, specific articles sold under, no implied conditions as to fitness, 166
- person receiving, from trespasser, whether guilty of trespass, 412

INDEX

Goods—*contd.*

- possession of,
 - acquired lawfully or unlawfully, immaterial for purpose of trover, 415
 - duty of buyer to take, 168
 - right of unpaid seller to retain, till payment or tender, 175
 - right to,
 - misdescribed as "special property in," 414 n.
 - necessary to found action of trover, 414, 414 n.
- promise to lend, not binding unless under seal, 198
- quiet possession of, implied warranty as to, 165
- reasonableness of time for delivery a question of fact, 113
- demand, 113
- receiver of, whether guilty of trespass, 412
- redelivery after notice of stoppage *in transitu*, 177, 178
 - expenses of, 177, 178
- refusal of seller to receive back, transit not ended by, 177
- refusal to accept, 173
- rejection of, by buyer, 172
 - on breach of warranty by seller, 181
 - on misdelivery, 169, 170
 - whether transit ended by, 177
 - not on breach of warranty, 164
- replevin, action of, for wrongful seizure of, 413
- retained by carrier in exercise of lien on, as against consignor and consignee, 260
- retention by carrier in exercise of lien, when justified, 260
- return of, to seller on rejection by buyer, 173
- seized by sheriff, trespass to, action for, maintainable, 410
- slander of, liability of person publishing to action for damages and injunction, 428
- "special property" in, not equivalent to "right to possession of," for purposes of conversion, 414 n.
- what included in, 414 n.
- specific, perishing after contract of sale, 162
 - perishing at time of contract of sale, 162
 - recovery of, by plaintiff in trover, 421 n.
- stoppage of, *in transitu*, 174, 176, 177
 - after part delivery, 177
 - by unpaid seller on insolvency of buyer, 176
 - giving notice of claim to carrier or bailee, 177, 178
 - taking actual possession, 177, 178
 - effect of transfer of documents of title on, unpaid seller's right to, 178, 179
 - redelivery to seller after notice of, 178
 - unpaid seller's right to, not affected by transfer of buyer's right, 178
- supplied under contract, recovery for, on default of one party, 321
- to be acquired by seller, 162
- to be manufactured, 162
- torts in respect of, committed during life-time of deceased person, right of personal representatives to sue on, 362
- trespass to, action of, by bailor against third persons, 409
 - against bailee when maintainable, 409
- trustee of, action of trespass by, maintainable, though *cestui que trust* in occupation, 410
- valuable,
 - carriage of, 252
 - consignor must declare nature of, 254 n.
 - declaration of value of, 252

INDEX

Goods—*contd.*

valuable,—*contd.*

- increased charges for carriage of, must be demanded by carrier, 253, 254 *n.*
- recovery of, 254, 255
- loss of, or injury to, in carriage, due to felonious acts of carrier, 255
- proof of value of, on loss of, 255
- wrongful retention of, by minor, under contract, plea of infancy no defence to action of tort for, 347
- wrongful seizure of, action of replevin for, 413

Goods of felon. See "Outlaw," "Waif."

Good title, definition of, 193

Goodwill,

- definition, 1029
- dissolution of partnership, and, 1031
- of partnership, vendor of, may not solicit customers of old business, 289
- vendor of, may carry on competing business, 289
- purchaser of, rights of, 1030
- vendor of, duties of, 1031
- receiving annuity out of profits, not necessarily a partner, 265
- receiving payment out of profits, postponed to other creditors, 265, 266
- rights of, 1030, 1031

Governor,

- Colonial, action of tort against, defences available to, 341
- may be brought in English or Colonial Court, 341

Gratuities,

- received by insured, when recoverable by insurer, 307 *n.*

Guarantee. See also "Principal debtor," "Surety."

- appointment of agent with *del credere* commission not a contract of, 236 *n.*
- continuing, 291, 292
 - avoided by subsequent misrepresentation or concealment, 293
 - effect of death of surety on, 300
 - revocation of, by notice to creditor, 293
 - revoked by change of partners of firm, 273
- contract of,
 - application of to all transactions of kind specified, 291, 292
 - application of to single transaction, 291, 292
 - consideration need not be expressed in writing, 291
 - defined, 290
 - distinguished from contract of indemnity, 290 *n.*
 - essentials of, 290, 291
 - indemnity appearing to be, 291 *n.*
 - liability of surety determined by, 293
 - when necessary to be in writing, 291
- limited, construction of, 293, 294
- of infant's debt for goods not necessities, 291 *n.*
- single, 291, 292
- specialty, 291, 293
- void if material facts misrepresented to, or concealed from, surety, 292

Guardian

- ad litem*, married woman cannot act as, 29
- appointed by deed, powers of, 1234
- appointment of, by Court, 1217, 1218 *n.*, 1219, 1221, 1222
- appointment of, by will, 1216 *n.*, 1218, 1219
- death of, 1224
- disagreement of, on questions affecting minor, 1229
- disclaimer by, 1224

INDEX

- Guardian—*contd.*
 domicile of ward changed by, 3
 father as, 1215
 "guardianship by nature," 1218 *n.*
 "guardianship for nurture," 1218 *n.*
 local custom, by, 1218 *n.*
 may be appointed by minor, 25 *n.*
 may be minor, 25
 mother as, 1215
 powers of, 1224, 1225
 provisional nomination of, by mother, 1219
 remedies for interference with guardianship of, 1225
 removal of,
 for offences under Children Act, 1908. . 1223
 minor from custody of, 1220, 1222
 on divorce, 1221, 1222
 restraint upon body of ward by, 440
 testamentary,
 control of minor's real estate by, 1231
 leases of ward's lands by, 1232
 powers of, 1234
 trustee for the ward, 1235
 Guardian in socage, 1217
 leases by, of ward's lands, 1232
 minor's real estate controlled by, 1231
 rights of patronage, 1233
 Guardians, Board of, action against, by pauper for injury suffered in course of work
 not maintainable, 343, 344
- Handicraftsman
 a "workman" for purposes of employer's liability, 449, 450
 considered as "workman," 225
- Habeas corpus*, writ of,
 for unlawful detention of minor, 1225
 liberty of wife and, 1181
 person wrongfully imprisoned may avail himself of, 444 *n.*
- Half-pay not alienable, 999 *n.*
- Haybote. *See* "Estovers."
- Hedge and ditch, presumption as to boundary, 779
- Heir,
 liability of,
 for covenants running with the land, 1363
 for breach of obligations to tenant, 1364
 limited by assets, 1369
 not protector of settlement, 566
 purchaser from, 190 *n.*
 right of retainer of, 1380 *n.*
- Heirlooms,
 nature of, 15, 934
 real estate, pass to personal representative as, 1355
 sale of, under Settled Land Acts, consent required, 888, 889
- Heriot,
 liability for, 551
- High Court, judgment obtained in, action on, in County Court not maintainable, 323
- Highway,
 dedication of, to public, 403 *n.*

INDEX

- Highway—*contd.*
 domestic animal on, trespassing on land adjoining, 358
 injury to public lawfully passing along, by dangerous work, liability of person
 authorising, 355
 nuisance, private, caused by alleged obstruction of, through non-feasance, action
 for, when maintainable, 404 *n.*
 obstruction on, causing public nuisance, abatement of, 400
 obstruction to, or danger to use of, a nuisance, 403
- Hire,
 contract of,
 defined, 195
 has no application to land, 195
 duty of hirer,
 to feed animals hired, 195
 to perform consideration agreed upon, 196
 to restore thing hired within reasonable time, 196
 to restore thing in condition in which received, 196
 to take reasonable care of goods hired, 196
 to use thing hired for purpose and time agreed on, 196
 indefinite, whether yearly, 211 *n.*
 of animals, ownership of offspring of, during hiring, 197
 of specific thing, letter not responsible for defects in, 195
 of thing entrusted to selection of letter, duties of letter to exercise care and
 skill, 195
 reasonable care of subject-matter of, what is, 196
- Hire-purchase agreement, nature and effect of, 950
- Holding over,
 effect of, 618
 by lessee, 642
 by tenant, 764
- Hops. *See* "Emblements."
- Horses, sale in market overt, 946
- Hotchpot,
 advancement to child to be taken into account, 1309, 1310
 heir-at-law, position of, 1310
 issue of child, position of, 1310
- Hour, reasonable,
 demand of goods must be made at, 169
 tender of goods must be made at, 169
 what is, a question of fact, 169
- House, besetting or watching approaches to, a nuisance, 402
- Housebote. *See* "Estovers."
- Housekeeper, authority to pledge credit of master, 57
- Howe v. E. of Dartmouth*, rule in. *See* "Trustee, wasting securities."
- Hundred (franchise of),
 county, severance from, 685
 Court of, 686 *n.*
 definition, 685
 deputation of gamekeeper, 687
 grant of, 687
 history, 685 *n.*, 686 *n.*
 Non Intromittas, 686 *n.*
 Non-Omittas, 686 *n.*
 sheriff, and, 685
- Husband
 cannot sue wife in tort, 348, 349

INDEX

Husband—*contd.*

- chastisement of wife by, right as to, 437 *n.*
- imprisonment of wife by, when justified, 437 *n.*
- insurable interest of wife in life of, 308
- insurance by,
 - for benefit of wife or children, 307
 - wife for benefit of, 307
- leases by, under Settled Estates Act, 897
- liability for funeral expenses of wife, 318, 1182
- liability of, for torts committed by wife before and during marriage, 356
 - for wife's maintenance, 1181, 1182
- of deceased,
 - action by personal representatives for benefit of, 363
 - entitled to compensation as "dependant," 462
- restraint upon body of wife by, when justified, 440, 441
- right of administration of wife's estate, 1315 *n.*
- right of, to wife's choses in action, 1315
- rights of, in wife's personalty, 1314, 1315
- seduction of wife, action for, not maintainable by, 464
- seised *jure mariti*, 1317

Husband and wife,

- communications between. *See* "Defamation, publication, what is."
- conveyance of land between, 905

Idiot. *See* "Lunatic."

Illegality,

- gift or promise in return for past, 42
- partnership dissolved by, 282
- penalty inducing, renders contract void, 139
- property transferred in contemplation of, recovery of, 43
 - by claimant *in minori delicto*, 43
- transactions involving, not generally enforceable, 41
- transactions partly illegal enforceable, 42

Illicit cohabitation, immoral and contrary to public policy, 41

Illusory exercise of powers, doctrine abolished, 874 *n.*

Immorality,

- display of acts of, a nuisance, 404
- gift or promise in return for past, 43
- property transferred in pursuance of immoral object, effect of, 41 *n.*, 43
- transactions involving, not generally enforceable, 41
- transactions partly immoral enforceable, 42
- what transactions immoral,
 - creditors, defeat or delay of, 41
 - duties imposed by law, evasion of, 41
 - irregular sexual connection, 41
 - marriage, complete or undue restriction on, 41
 - procurement of, for reward, 41
 - prospective dissolution of, 41
 - misconduct, concealment of, 41
 - public offence, stifling of prosecution for, 41
 - public office, purchase or sale of, 41
 - public office, procurement of resignation of, 41
 - trade, unreasonable restraint of, 41
 - trade, deception in matters of, 41

Immunities. *See* "Franchise."

INDEX

- Impossibility,
 - bond conditioned for performance of, 140
 - contract to pay penalty for non-performance of, amounts to mere voluntary promise, 140
- Impossibility of performance,
 - of contract,
 - arising from foreign law, 129
 - in law, 129
 - in law known to one party only, 129 *n.*
 - in nature, 129
 - of one of two alternatives,
 - after choice made, 131, 132
 - liability of promises to perform other, 131
 - partial, effect of, 132
 - supervening, 130, 132
 - due to alteration in law, intention of parties as to, 130
 - presumed intention of parties as to, 130
- Impotence, annulment of marriage for, 1176, 1177
- Imprisonment. *See also* "False imprisonment."
 - actual, by act of third party, when defendant in action of false imprisonment liable for, 440, 440 *n.*
 - battery not included in every, 439 *n.*
 - justification, for assault, generally justification for, 443
 - of wife by husband, when justified, 437 *n.*
- Improvements,
 - statutory power of tenant for life to make, 879
 - under Settled Land Acts, require consent, 888
- Incestuous adultery, definition of, 1188
 - wife's ground for divorce, 1187
- Incorporeal hereditaments,
 - appendant, 674 *n.*
 - appendant and appurtenant, pass without words, 678
 - appendant, cannot now be created, 675
 - appurtenant, 676
 - appurtenant, and dominant tenement, 677
 - appurtenant, pass by grant, 677
 - creation of, 673 *n.*
 - definition of, 16, 16 *n.*, 669
 - dignities included in, 16
 - disturbance of, 681
 - dominant tenement, 676, 677
 - escheat of, 674
 - extinction of, 676, 673, 680
 - franchises considered as, 16
 - gross, in, 679
 - history of, 670 *n.*
 - infringement of, proof of damage in action for, 326 *n.*
 - interests in, 671
 - liability to dower, 1319 *n.*
 - new kind cannot be created, 670
 - non-user, no proof of abandonment, 852
 - offices considered as, 16
 - pasture, right of, described as, 16 *n.*
 - peerages considered as, 16
 - public rights treated as property included in, 16
 - rules of tenure applicable to, 672 *n.*

INDEX

- Incorporeal hereditaments—*conid.*
 severance of, 678, 679 *n.*
 suspension of, 673
 waste of, 672 *n.*
 what interests in land included in, 16
 yearly tenancy of, notice to determine, 673 *n.*
- Incorporeal personal property. *See* "Chose in action."
- Incumbent, sale by, under Settled Land Acts, 912
- Incumbrance,
 implied undertaking to sell land free from, 187
 implied warranty that goods sold free from, 165
 on particular assets, 1394
- Indecency,
 public display of acts of, a nuisance, 404
- Indecent literature
 public display of, a nuisance, 404
- Indemnity,
 agent entitled to an, revocation of authority partly executed, 241
 amongst tort-feasors, 337
 by firm to partners, 277
 by principal debtor to surety
 before default, 295
 for all liability and loss incurred, 294
 by surety on satisfaction of condition, right to, 296
 contract of,
 appearing to be guarantee, 291 *n.*
 distinguished from contract of guarantee, 290 *n.*
 due to agent from principal, 237
 for unlawful acts done at instance of principal, 237
 for money paid or act done under threat of legal proceedings or legal restraint
 of goods, 317
 for salvage, 324, 325
 for voluntary act or payment for another, 317
 for voluntary expenditure in preservation or improvement of property or
 conduct of affairs of another not payable, 324, 325
 recoverable by employer paying compensation from third person, 459, 459 *n.*
 right of mortgagee to, for moneys expended in preservation of mortgaged
 property, 324, 325
 right to, of person incurring liability at request of, and on behalf of another,
 324
 right of servant to, from master, 210
 trustees to, for money expended in preservation of trust, 324, 325
 to defendant, interlocutory orders conditional on, 376 *n.*
 to master for wrongful acts of servant, 211
 to partners by partners guilty of fraud, 287
 to surety, joinder of person liable for, in action by creditor as third party, 302
- Independent contractor,
 absolute duty imposed on employer by common law or statute, not discharged
 by employment of, 354
 employed to do lawful act, employer not liable for negligence, 355
 improper or imperfect performance of work by, employer not generally liable
 for, 354
 liable with employer for wrongful act of contractor or servant, 355 *n.*
- Infancy. *See also* "Minor," "Infant."
 no defence to action of tort against minor, when tortious act indirectly con-
 nected with contract, 347

INDEX

Infant. *See also* "Minor."

- debts of, for goods not necessities, person purporting to guarantee, 291 *n.*
- executor, as, power of Court in relation to, 1331
- may contract to become apprentice, 217
- member of partnership firm, 267
- not liable on contract to serve, 217
- performance of contracts by, not enforceable, 128 *n.*
- premium payable by, on apprenticeship, liability for, 216, 217
- restraint upon body of, by father, 440
- specific performance, decree for contract entered into by, not obtainable, 128
- will of, 1255

Infectious diseases,

- harbouring or exposing of cases of, a nuisance, 402

Inflammable substances,

- harbouring or exposing of, a nuisance, 402

Information

- obtained by agent, in course of employment, may not be used against principal, 234

- in confidence, action for damages and injunction against person publishing, 427

Informer. *See* "Common informer."

"Inheritable issue," definition of, 1289

Injunction,

- acquiescence of plaintiff, ground for refusing, 377
- against continuance or removal of nuisance, 400, 401
- continuation or repetition of tortious acts by independent tort-feasors, 337
- person publishing information obtained in confidence, 427
- third parties obtaining confidential information from employee, 223 *n.*
- as remedy for person injured by tort, 369
- damages in lieu of,
 - when awarded by Court, 377
 - when not awarded, 378
- decree though penalty or liquidated damages provided for, 139
- for abatement of nuisance, 392 *n.*
- for breach of statutory duty, when right of action for damages excluded, 328 *n.*
- for commission, continuance or repetition of tort, when granted, 374
- for continuance or repetition of tort, may be granted before trial by way of interlocutory order, 375 *n.*
- for specialty contract without consideration not granted on breach, 96
- mandatory, by way of interlocutory order, when granted, 376, 376 *n.*
- negative contract, breach of, may be restrained by, 128
- positive in form, breach of, restrained by, 128 *n.*
- no substantial damage suffered by plaintiff, ground for refusing, 377
- on reasonable apprehension of continuance or repetition of tort, when granted, 374
- oppressive to defendant, damages awarded in lieu of, 377
- order for account obtained as ancillary to, 378
- personal services, breach of contract for, restrained by, 128 *n.*
- person threatened with proceedings for infringement of patent, when entitled to, 426 *n.*, 427 *n.*
- prohibitory, 376
- to restrain betrayal of confidence by servant, 210
- commission of apprehended nuisance, 401
- breach of confidence by employee, 223

Injury. *See* "Employers' Liability Act," "Workmen's Compensation Act."

INDEX

- Inland lake,
 - no "free fishery" in, 702
 - no public right of fishery in, 701
- Inn,
 - common, entry in under authority of law, justifiable trespass, 385
 - defined, 244
 - guest at, who is, 245 *n.*
 - lodger at, not guest, 245 *n.*
- Innkeeper,
 - answerable for safety of guest's belongings, 244, 245
 - duty of, to exhibit copy of sect. 1 of Innkeepers' Liability Act, 246, 247
 - to receive travellers and baggage, 244
 - goods deposited for safe custody with, 246
 - guest of, person hiring rooms is not, 245 *n.*
 - guest of, who is, 245 *n.*
 - lien of, 961
 - enforcement of, 248, 966
 - goods detained in exercise of, liability for loss or damage to, 247 *n.*
 - not lost by taking of other security from guest, 247
 - on goods of guest, 247
 - limit of liability of, for loss or injury to goods or property of guests, 245, 246
 - loss or injury to goods of guest, when not liable for, 245
 - payment in advance, right of, 244
 - refusal to receive goods or property of guest for safe custody, effect of, 246
- Insanity. *See* "Lunacy."
- Insolvency. *See* "Bankruptcy."
- Insolvent estate,
 - administration of, 1387
 - effect of Bankruptcy Act, 1389
 - personal representative's right of indemnity out of, 1415
 - rules of bankruptcy applied to administration of, 1388, 1389
- Instalments,
 - delivery of goods by,
 - buyer need not accept, 170
 - failure to perform contract for, effect of, 170
- Insurable interest,
 - as measure of amount recoverable under policy, 305, 306 *n.*
 - how far presumed from relationship, 307, 308
 - nature of, 308
 - necessity for, 304, 305
 - of creditor in life of debtor, 308
 - of surety in life of co-surety, 308
 - what is, 303
- Insurance. *See also* "Fire insurance," "Insurable interest," "Life insurance," "Marine insurance," "Policy of insurance."
 - against loss by plaintiff not taken into account in estimating damages in action of tort, 371
 - amount recoverable by insured, 305, 306
 - by friendly society, 304 *n.*, 305, 307, 308
 - contract of,
 - amount recoverable under, 305, 306
 - defined, 303
 - form of, 303
 - insurable interest in,
 - necessity of, 304, 305
 - time of existence of, 304, 305

INDEX

Insurance—*contd.*

- contract of—*contd.*
 - in writing, 303, 304
 - made by way of gaming and wagering void, 308
 - premium as consideration in, 303
- creditors of insured, fraud on, by matrimonial insurance, 307
- disclosure by insured of all material facts essential, 305
- gratuities or benevolences to insured, when recoverable by insurer, 307 *n.*
- matrimonial, 307
- moneys received by insured from third parties in respect of loss may be recovered by insurer, 319
- moneys received, vendor not trustee of, for purchaser, 192 *n.*
- names of persons interested in policies of, must be inserted, 303
- of goods where delivery involves sea transit, 171
- subrogation of insurer to remedies of insured, 306, 307
- vendor need not keep up for purchaser, 192 *n.*
- workmen's compensation, workman's rights on employer's bankruptcy, 461

Intention,

- apparent and real, 33
- as to avoidance or discharge of contract in case of partial impossibility, 132
- as to liquidated damages or penalty, 137
- as to remuneration of servant, 208
- concurrent expression of contract completed by, 87
- confirmation of, when induced by fraud, etc., 35
- construction of, on one of two alternatives becoming impossible, 131
- declaration of,
 - by conduct, 32
 - by words, 32
 - by writing, 32
 - by signs, 32
- may be direct or indirect, 32—33
- not meant to produce legal consequences unenforceable, 33
- delivery of specialty contracts by declaration of, 96—97
- expression of, not to perform contract, effect of, 146
- in act or omission giving rise to action for tort, 329, 329 *n.*
- nature of, question of fact, 33
- presumption of,
 - when impossibility of performance supervening, 130
 - as to non-assignability of personal contract, 141
- reasonable indication of, effect of, 32
- revocable if induced by
 - duress, 34
 - fraud, 34
 - threats, 34
 - undue influence, 34
- revocation of,
 - against volunteers, 34
 - against whom, 34
 - must be within reasonable time, 34
 - reasonable time for, question of fact, 34
- to create
 - legal obligation essential in contract, 85, 86
 - partnership, 262

Interesse termini,

- creation of, 610
- liabilities of owner of, 612

INDEX

Interesse termini—contd.

- merger of, 611
- nature of, 611
- release of, 610, 611
- rights of owner of, 612

Interest,

- accrual of,
 - from day to day, 116
 - future, prevented by tender duly made, 108
- apportionable between persons successively entitled to principal fund, 116
- as damages, when allowed by Court or jury, 117
- damages in nature of, awarded by jury in cases of trover, 415 n.
- in action for breach of contract, 120—121
- not payable on recovery of money deposited with stakeholder to abide event of valid transaction, 321
- on account stated in respect of money lent, 118
- on advances or payments by partners beyond amount of capital subscribed, 277
- on balance due to principal from agent, 233
- on bill of exchange,
 - from what date payable, 118
 - for what period payable, 118
 - recoverable as damages after maturity, 118
- on bond,
 - penal, 118
 - single, 118
- on capital subscribed by partner before ascertainment of profits, 277
- on contract to pay debt by bill or note, 118
- on debt, must be included in tender, 108
 - when payable, 115
- on judgment,
 - at what rate, 117
 - for what period payable, 117
 - of County Court, 117 n.
- on loan paid out of share of profits, partnership not implied from, 265
- on money paid by surety, 118
- paid by surety to creditor included in indemnity payable by principal debtor, 294
- rate of,
 - in case of loans by money-lenders, 116
 - equitable, 119
 - on judgments, 117
 - may be agreed to by parties, 116
 - mercantile, 119
- recovery of, by action with or without principal debt, 116
- separable from principal, 116
- statute-barred, 116
- under contract for sale of land, 119
 - on lien for return of deposit, 119
 - on vendor's lien for unpaid purchase-money, 119

Interests less than estates, list of, 553

Intestacy,

- claim by, rights and limitations of, 1311—1312
- definition of, 1311

Intestate succession,

- age and sex in relation to claims to, 1309
- beneficiary must account for debts owed, 1311

INDEX

- Intestate succession—*cond.*
 - bona vacantia* in relation to, 1327—1328
 - escheat in relation to, 1326—1327
 - hotchpot, 1309—1311
 - parental rights, 1308
 - person causing death, by, 1296
 - rules of, respecting classes of successors, 1295
 - title of beneficiary, 1296
 - widow's statutory claim, 1317
- Ireland, judgments of superior Courts of, effect of registration of, 323 *n.*
- Jactitation of marriage, 1178
- Jetsam, nature of, 700 *n.*
- Jews, marriage of, 1156, 1158
- Joint and several liability of partner for torts, 270
- Joint and several promisors, 154. *See also* "Co-promisors."
 - contribution amongst, 156
 - on insolvency of one, 156
 - judgment recovered against one, effect of, 154—155
 - release of one, liability of others discharged by, 155
- Joint claimants, or payment to one of several, effect of, 76
- Joint mortgages, effect of, 1090
- Joint ownership,
 - estate tail in, 1088
 - existence of partnership not implied from, 263
 - limitation creating, 1088
 - partners, of, 1089—1090
 - severance of, 1092
 - survivorship in, 1089
 - unities of, 1088 *n.*
- Joint promisee
 - and several promisees, 156
 - death of one, survival of rights of, 157
 - in case of joint loan, 157
 - enforcement of promise by, 157
 - payment to one, discharge of promisor's liability to other, 159
 - release by one, discharge of promisor's liability to others, 158
 - unless fraudulent, 158
- Joint promisors, 153. *See also* "Co-promisors."
 - contribution amongst, 156
 - on insolvency of one, 156
 - death of last surviving, liability passes to representative on, 155
 - death of one, survival of joint liability, 155
 - judgment recovered against one, discharges liability of others, 154—155
 - obligation of, to contribute to payment by co-promisor, 317 *n.*
 - release of one, liability of others discharged by, 155
- Joint purchases, effect of, 1091
- Journeyman considered as "workman," 225, 449, 450
- Judge, torts of,
 - committed in excess of jurisdiction, liability for, 342
 - done in judicial capacity, no action for, 342
- Judgment,
 - action on, 322
 - against co-promisors, execution on, 155
 - firm, execution on, 276
 - joint promisors, effect of, 154—155

INDEX

Judgment—*contd.*

- damages ascertained by, before date of receiving order, 367
- discharge of rights of action by, 152
- effect of registration of Scottish and Irish, 323 *n.*
- foreign, action on, 322, 323
 - as "evidence of debt," 323 *n.*
 - debt of record in English tribunal not created by, 323 *n.*
 - defences to, 322, 323
- for price of goods, lien of unpaid seller not lost by, 176
- in detinue, effect of, 425
- in trover, effect of, 421
- interest payable on,
 - at what rate, 117
 - levied under writ of execution, 117
 - for what period, 117
- obtained against one co-tort-feasor, action against others barred by, 336
- obtained in High Court, action on, not maintainable in County Court, 323
- of County Court, action on, not maintainable, 323, 323 *n.*
- recovered against one of joint and several promisors, effect of, 154—155
- recovered against one of several promisors, effect of, 154—155

Judicial act,

- issue of ordinary writ of summons is not, 67 *n.*
- time of accomplishment, 67

Judicial privilege. *See* "Defamation, action of, judicial privilege."

Judicial trustee,

- appointed, when, 1110—1111
- appointment of, by Court, 1342
- executor or administrator may be appointed, 1342
- powers of, 1137

Judicial separation,

- absolute bars to, 1193, 1194
- divorce after, 1189
- domicile in relation to, 1204
- domicile of married woman, effect on, 3 *n.*
- dower, effect on, 1323 *n.*
- effect of decree of, 1196
- effect on succession, 1316
- grounds for, 1192, 1193
- maintenance order under decree for, 1200, 1201
- misconduct of petitioner, effect of, 1195
- petition for, delay in presenting, 1194

Jurisdiction, creditor outside the, duty of debtor as to performance, 111

Jury,

- amount of damages in action of tort is question for, 369
- damages assessed by, subject to direction of Court in matters of law, 124
- damages awarded by,
 - in cases of trover, 415 *n.*
 - unreasonable, new trial ordered on account of, when, 371
- estimate of damages by, in action of tort, 371
- irrelevant matters taken into consideration by, verdict disturbed on ground of, 371
- material points not considered by, verdict disturbed on ground of, 371
- nominal or contemptuous damages awarded by, when, 370
- verdict of,
 - amounting to compromise, disturbed by Court, 372
 - influenced by prejudice or passion, disturbed by Court, 372

INDEX

- Jury—*cond.*
 vindictive or exemplary damages awarded by, when, 370
Jus spatiandi, customary, 746
Jus tertii,
 defence of,
 in action of detinue, 425
 in action of ejectment, 389
 in action for trespass to land, 384
 in action of trover, 420, 421
 pledgee may set up, 957
 Justice of the Peace, privilege of constable for anything done in obedience to, 343
 Kindred, mode of reckoning degrees of, in relation to distribution of personal estate, 1308
 King's Proctor,
 intervention of,
 in divorce proceedings, 1192
 on ground of collusion, 1186
 Kinship. *See* "Maintenance, action for, justification."
 Labourer
 a "workman" for purposes of employers' liability, 449, 450
 considered as "workman," 225
 Laches, effect of, on claim for dower, 1320
 to rescind, 34
 Land. *See also* "Realty," "Sale of land."
 access to, right of, implied in contract of sale of, 187
 annoyance, prejudice or disturbance in enjoyment of, amounting to nuisance, 391
 assault or battery justified when acts done in defence of possession of, 434, 435
 bankruptcy by involuntary alienation of, 859
 boundaries, presumption as to, 777
 chattels found on, possessor of, may maintain detinue for, 424
 claims to recover,
 barred by period of twelve years, 73
 money charged on, barred by period of twelve years, 73
 co-owner of, may recover possession and mesne profits by action in nature of ejectment, 388, 389
 corporation cannot hold, by copy of court roll, 10
 delivery of possession of, when ordered by Court, 379, 379 *n.*
 depreciation in value of, owing to subsidence, caused by neighbour, 373 *n.*
 destruction of dog trespassing upon, when justified, 361
 division of, 777
 easements included in, 18
 entry on,
 by landlord for purpose of demanding rent justifiable trespass, 385
 by person entitled to immediate possession, 383
 for abatement of private nuisance, 398
 illegal, assault or battery in resistance of, justified, 434
 execution against, 863
 not by County Court, 864 *n.*
 registration of, 864
 fixtures included in, 17
 forcible entry on, by person entitled to immediate possession, liability for, 383

INDEX

Land—*contd.*

- franchises included in, 16
- interest in, belonging to partnership treated as personalty, 275
 - purchaser of, right of, to call for title, 194
- in occupation of tenant at will, trespass to, 382
- lateral or vertical support of, interference with, a nuisance, 402
- let or sold, continuing nuisance on, liability in respect of, 397
- money charged on, title of person claiming, not extinguished by limitation of action, 80
- must not be seized by force, 82
- nuisance causing physical injury to, cost of restoration of, as measure of damages, 398
- occupier of,
 - action by, for nuisance, 395
 - dangerous substances brought on, by, liability in respect of, 405
 - duty of, to exercise care to prevent injury being caused by defect in premises, 332
 - liability of,
 - as invitor, 355
 - in respect of predecessor's nuisance, 397
 - presumably creator of nuisance, 396
 - right of,
 - to drain and take percolating water through undefined channels, 403 *n.*
 - to take percolating water does not cover right to give or abstract silt from defendant's soil, 403 *n.*
 - suit in trespass by, 382
 - when liable to neighbour for damage done by wild animals, 360
- of riparian proprietor, water flowing past, right to use of, 403 *n.*
- partnership, devolution of legal estate in, 274
- partnership relating to, 267
 - agreement to retire from, 267 *n.*
- possession of,
 - action of ejectment against person withholding, 388
 - obtained by forcible entry, 383
- possessor of,
 - not put to proof of title by wrongful eviction, 383
 - title of, to chattels found on, 424
- profits à prendre* included in, 18
- profits or rents of, in excess of share received by joint tenants, liability to account for, 320
- proprietary rights in, exercise of, not as justification for nuisance, 393
- purchased out of partnership profits not held in partnership, 275
- recovery of,
 - action for, cannot be defeated by want of legal estate, 388 *n.*
 - in ejectment, after death of ejector, 364 *n.*
- relation back of title of person entering on, 384
- scope of term, how determined, 17 *n.*
- situate abroad, actions concerning contracts or equities affecting, in Courts of Equity, 339 *n.*
- slander of title to property in, action for damages in respect of, 406
- subsidence of, caused by neighbour, right of landowner to damages for, 373 *n.*
- things attached to or forming part of, included in term "goods," 161
- title to, cannot be acquired by alien by virtue of events before 1870.. 31
 - extinguished on expiry of period of limitation of action, 80
- torts in respect of, 405, 406
- to which public have access, finder of chattels on, may maintain detinue for, 424

INDEX

Land—*contd.*

- trespass to,
 - action of,
 - brought by person *de facto* in exclusive possession, 381
 - jus tertii* as defence to, 384
 - when maintainable by co-owners against each other, 387
 - ab initio*, 384
 - appreciable damage in fact need not be proved in action for, 326
 - by reversioner to detect waste justifiable, 385
 - committed in lawful exercise of private easement or *profit à prendre*, justifiable, 386
 - under licence of plaintiff, justifiable, 386
 - defined, 380
 - ejectment of trespasser, 382, 383
 - in exercise of lawful custom, justifiable, 385
 - in lawful execution of lawful process, justifiable, 385
 - justified if committed under authority conferred by law, 385
 - on what grounds justified, 385, 386
 - remedy for, under old procedure, 380 *n.*
 - to abate a private nuisance justifiable, 385
 - to prevent commission of murder justifiable, 385
 - to prevent spread of fire justifiable, 386
 - to recover goods of defendant, when justifiable, 386
 - trespasser cannot justify by setting up title in another, 384
 - trespasser may justify by setting up title in himself, 384
 - what included in, 17
 - writ of possession, appropriate machinery in case of, 379 *n.*
 - wrongful occupation of, right of owner to sue for use and occupation not created by, 319

Land, charge on,

- annual, carries remedies of rent-charge, 838
- redemption of, 838
- lien, when arising, 839
- mode of effecting, 837
- personal property, when, 841
- purchaser who has paid, has, 839
- rights of owner of, 837
- testamentary, personal representative may sell, 838
- vendor unpaid has, 839

Land, conveyance of,

- deed, by, may be disclaimed, 811
- takes effect on delivery, 811
- form of, 808
- grant, by, construed against grantor, 812
- revocable, void, 814
- voluntary, binding on grantor, 813
- voluntary, not revoked by alienation for value, 814

Land, mortgage of,

- annual rests, in mortgagee's account, 820
- clogging the equity, what, 830
- consolidation, history of, 833—834 *n.*
- no right to, unless reserved, 832
- rules of, 833
- definition, 815
- floating charge on, 832
- foreclosure, right of mortgagee to, 819

INDEX

Land, mortgage of—*contd.*

- form of, 815
- insurance, mortgagee, by, 826
- interest, provision for raising, 831
- leases, mortgagee, by, 821
- marshalling, right of, 836
- mortgagee, rights of, 818—820
- mortgagee, when bound to account, 819
- mortgagee's interest is personalty, 818
- mortgagor, leases by, 834
 - may deal with equity, 827
 - may demand transfer, 835
 - right to inspect deeds, 835
- penalty in, 832
- personal remedy on, 819
- possession, equitable mortgagee not entitled to, 820
 - right of legal mortgagee to, 818
- priorities, 816
- provision for pre-emption, 831
- receiver, appointment of, by mortgagee, 822, 823, 824
- reconveyance, effect of on priorities, 829
- redemption, postponement of, 830
 - right of, in mortgagor, 828
 - when right arises, 819
 - who may exercise right of, 828, 829 *n.*
- restrictions on sale by mortgagee, 823
- retainer of interest after redemption, 831
- sale, mortgagee, by, 822, 823
 - when, 824
- sale, prior incumbrances and, 822 *n.*
- statutory powers of mortgagee, may be modified, 826
- statutory rights of mortgagor, 834—835
- timber, cutting by mortgagee, 822
- transfer, effect of, 817

Land, occupier of,

- access to way or sea, 772
- dangerous substances, liability for, 774
- fence, not bound to, 774
- fences, no right to, 783
- fire, liability for, 775
- liabilities of, 773—776, 784
- liability for traps, 775
- liability to strangers, 774
- must not remove sea barrier, 773
- negligent cultivation, not liable for, 784
- public burdens, liability for, 776
- rights of, 769—773
- right to ward off danger, 772
- support, right of, 781

Landlord and tenant,

- determination of tenancy by " 6 months' " notice, time comprised in, 70
- entry by landlord on land for demanding rent or levying distress justifiable trespass, 385
- immediate landlord of tenant at will may sue for trespass to land in occupation of tenant at will, 382

INDEX

- Landlord and tenant—*contd.*
lodger contracting for exclusive use of specific room may sue in trespass even against landlord, 382
- Lands Clauses Consolidation Act, 1845,
claim under, to compensation in respect of lands injuriously affected by public undertaking, not a claim to recover damages for tort, 366
- Larceny,
bailee, by, 409 *n.*
bailee obtaining possession by deceit intending to misappropriate, guilty of, 409 *n.*
- Law,
act compelled by, no consideration, 95
act or forbearance contrary to, no consideration, 95
discharge of contract by operation of, 144
duties imposed by, evasion of, illegal, 41
impossibility of performance in, contract rendered void by, 129
interest in, effect of forfeiture by fulfilment of condition subsequent, 50, 51
- Leap Year, dates of, 70
- Lease, leasehold, etc. *See* "Estate for years."
- Lease,
at once conveyance and contract, 87 *n.*
commencement of title, on sale of, 193
disclaimer of, by trustee in bankruptcy, 860, 861, 862
forfeiture of, 50
purchaser of, bound to covenant to pay rent and perform the covenants and indemnify vendor against liability, 181 *n.*
relationship of lessor and lessee not created by, totally void, 390 *n.*
relief against forfeiture of. *See* "Condition."
short, may be oral, 808
surrender of, tenant for life may accept, 879
voidable, when validated, 890
- Leaseholds. *See also* "Estate for years."
of undischarged bankrupt,
must be expressly claimed by trustee, 28
sold before intervention of trustee, 28
- Leasing, statutory powers of, by tenant for life, 878, 879
- Leet, nature of, 687, 688 *n.*
- Legacy,
abatement of, 1265
ademption of, 1263, 1264, 1282
appropriation of, definition of, 1277 *n.*
change in character of bequest, 1264
chargeable with payment of debts, 1392—1393
charge on, 1395
charged upon real estate or a mixed fund, 1397
class gifts, 1286
contingent, appropriation of fund to meet, 1412
debtor legatee, 1276, 1281
definition, 1261 *n.*
"demonstrative," 1266
double,
presumption against, 1274, 1275
presumption in favour of, 1275
dower not barred by, 1325
duty free, 1266 *n.*

INDEX

Legacy—*contd.*

- executor, to, 1285
- general, definition of, 1263
- implied charge of, 1398
- in common, 1288
- interest on,
 - arrears of, 1272, 1273
 - general legacy, 1271
 - in exceptional cases, 1272
 - legacy for life, 1270
- issue of testator, to, 1287
- joint, 1288
- lapse of, 1287
- minor, to, 1233, 1234
- moral obligation fulfilled by, 1289
- payable out of personal estate only, 1374
- payment into court of, by personal representative, 1413
- payment of, admission of assets by, 1419
- pecuniary legatee's right to payment of, 1397 *n.*
- personal representative's assent to, 1268, 1269
- presumption of ademption of, 1282
- presumption that confined to legitimate relations, 1274
- priority of, 1266
- residuary, 1267
- revocation of, by ademption, 1263
- right of acceptance and rejection of, 1277, 1278
- satisfaction of debts by, 1281
- specific, definition of, 1263
- title of beneficiary, 1267
- vested, appropriation of fund to meet, 1412
- voidance of, for insufficient description of beneficiary, 1262
- Legal capacity. *See also* "Legal incapacity."
 - active, 1 *n.*
 - child *en ventre sa mère*, of, 1
 - domicile of person possessing, 2
 - meaning of, in English law, 1 *n.*
 - passive, 1 *n.*
 - time of commencement of, 1
 - when complete, 1
- Legal day. *See* "Time."
- Legal estate,
 - merger of equitable interest in, 553 *n.*
 - negligence of owner may postpone, 761
- Legal incapacity
 - of alien, 2
 - enemy, 20
 - of bankrupts undischarged, 2
 - of convicts, 2, 20
 - of married women, 2
 - of minors, 2
 - of outlaws, 2
 - of persons of unsound mind, 2
 - persons subject to, 1—2
- Legal proceedings, money paid or act done under threat of, indemnity for, 317
- Legatee,
 - claim upon real estate, 1397, 1398

INDEX

Legatee—*contd.*

- marshalling of assets by, 1399—1400
- right to payment of legacy, 1397 *n.*
- sale by, as personal representative, purchaser's title, 1408, 1409

Legitimacy,

- declaration of,
 - binding force of, 1208, 1209
 - petition for, 1208
- domicile in relation to, 1206
- general rule as to, 1205
- gestation, period of, in relation to, 1208
- legitimated person not entitled to inherit, 1206
- legitimation by subsequent marriage, 1205
- non-access and presumption of, 1207
- presumption of, 1206, 1207

Lessee estopped from denying title of plaintiff in ejectment to grant lease, 390

Lessor,

- nuisance caused on failure to repair by, liability for, 396
- nuisance, express contract with lessee for abolition of, 397 *n.*

Letter and envelope treated together as single document, 102

Letters of administration, action of trespass for injury to goods of deceased before grant of, 410

Libel. *See also* "Defamation, action for."

- appreciable damage in fact need not be proved in action for, 326
- definition, 500
- interlocutory injunction in cases of, when granted, 375 *n.*, 376 *n.*
- proof of malice in action for, effect of, 335 *n.*
- words written or spoken in course of judicial proceedings, 342

Licence rights distinguished from easements, 705. *See also* "Patent."

Licences, statutory power to grant by tenant for life, 879

Licensee, estoppel of, from denying title of plaintiff in ejectment to grant licence, 390
injury caused to, by defect in premises, liability of occupier of land as to, 332

Lien. *See also* "Share (in company)," "Land, charge on," "Chattels corporeal."

- banker's, general, on securities deposited, 205
- common carrier exercising, on goods entrusted for carriage, 251
- equitable, liability for satisfaction of, on succession, 1396
- for return of deposit or purchase money under contract for sale of land, interest on, 119
- "general," what is, 205 *n.*
- allowed to agents by custom, 238 *n.*

of agent,

- extension of, by custom or agreement, 238
- in respect of expenses and commission on movables of principal, 237, 238

of carrier,

- extension of, by agreement or usage, 260
- goods retained in exercise of, against consignor and consignee, 260
- on goods delivered for carriage in respect of charges, 260

of deposittee for charges, 205

of employee

- dependent on possession, 223, 224
- on chattel, 223
- not owned by employer, 223 *n.*
- when agreement to give credit after completion of work, 224

INDEX

Lien—*contd.*

- of innkeeper, 247
 - enforcement, 248
 - loss of or damage to goods detained in exercise of, liability for, 247 *n.*
 - not lost by taking of other security from guest, 247
- of unpaid seller of goods,
 - after part delivery, 175
 - effect of transfer of documents of title on right of, 178, 179
 - exercise of right of, contract of sale not rescinded by, 179
 - for price of goods sold, 174
 - insolvency of buyer, 175
 - loss of, 175, 176
 - on buyer obtaining possession, 175, 176
 - by delivery of goods to bailee for transmission, 175
 - by waiver, 175, 176
 - not affected by transfer of buyer's right, 178
 - not lost by recovery of judgment for price, 176
 - on expiry of credit, 175
 - though agent or bailee for buyer, 175
 - waiver of, 175, 176
 - where no stipulation as to credit, 175
- of partner on surplus assets after rescission of partnership contract, 286
- "special," what is, 205 *n.*
- vendor's, for unpaid purchase money under contract for sale of land, interest on, 119
- wharfinger's special and general, for charges, 205
- Lienor, pledge of goods by, amounting to conversion, 416 *n.*
- Life estate
 - limited until alienation or bankruptcy, 43
 - may be made terminable on alienation or bankruptcy, 44
 - payment of interest by owner of, under devise, 75
- Life insurance,
 - amount recoverable under contract of, 305, 306
 - assignability of policy of, 305 *n.*
 - effected with
 - friendly societies on lives of children, 307, 308
 - industrial assurance companies on lives of children, 307, 308
 - insurable interest in contract of, time of existence of, 304
- Light,
 - peculiarities of, 857
 - prescriptive right to, 856
 - does not bind Crown, 856
 - right of,
 - alternative offered, 712
 - definition, 710
 - not lost by pulling down of dominant tenement, 711
- Limitation of action. *See also* "Statutes of Limitation."
 - acknowledgment by one of joint claimants, 76
 - causing periods to recommence, 74
 - made by one of co-debtors, effect of, 75
 - must amount to promise to pay, 75
 - actions against public authorities subject to, 345
 - agricultural holding, limitation of distraint on, 80—81
 - as against persons entitled to future interest in land or rent, 77
 - as against persons liable to be barred by a tenant in tail, 78
 - bankrupt tenant, limitation of arrears recoverable from, 81

INDEX

Limitation of action—*contd.*

- breach of trust by trustee, effect of, on, 77
- by auditors against poor law guardians, 73
- claim against heir apparent to the Crown barred by period of three calendar months, 74
- claim for trespass to person, assault, or false imprisonment, barred by period of four years, 73
- claims barred by period of
 - six months, 73—74
 - two years, 73
 - three years, 73
 - six years, 74
 - twelve years, 73
 - twenty years, 72
- “concealed fraud,” effect of, on, 76
- contract rendered unenforceable by, 86 *n.*
- Crown suits not affected by, 80
- debt barred by, creditor may appropriate payment to, 114
- distress and entry barred by, 72 *n.*
- extinction of title by expiry of period, 80
- interest barred with principal, 116
- in tort, 368
- period of limitation,
 - against tenants at will, 78
 - against tenants for years where no lease, 78
 - effect of infancy on, 77
 - insanity on, 77
 - for claims of ecclesiastical or eleemosynary corporation sole, 78, 79
 - in relation to advowson, 79
 - in respect of claims of Crown to realty, 79
- period of, when beginning to run, 72, 77
- periodical payments, recovery of arrears of, limited to six years, 80, 81
- revival of claim under contract barred by, 86 *n.*
- tithe rent charge, recovery of arrears, 80
- trustee, when pleaded by, 77, 1145
- under Employers’ Liability Act, 1881. .453
- Limited owners, statutory powers of, 878—897
- Liquidated damages,
 - injunction granted notwithstanding agreement as to, 139
 - or penalty,
 - decision of Court as to, with reference to intention of parties, 137
 - language immaterial in determination of, 138
 - recoverable in full, 137
 - specific performance decreed notwithstanding agreement as to, 139
 - specified sum for promises of uncertain value recoverable as, 139
- Liquidator of company, assignment by, of action in tort, 365
- Live stock, stranger, of, for breeding cannot be distrained, 972 *n.*
- Loan of goods,
 - contract of,
 - defined, 198
 - duty of borrower under,
 - to exercise skill and care in regard to thing lent, 199
 - to restore thing lent at time agreed, 199
 - to restore thing lent in condition at time of lending, 199
 - to restore thing within reasonable time after demand, 199
 - to use thing for time and purpose for which lent, 199

INDEX

- Loan of goods—*contd.*
 - contract of—*contd.*
 - duty of lender under, to make known latent defects to borrower, 199
 - lender may demand return at any time under, 200
 - rights of borrower under personal, 199, 200
 - promise as to, not binding unless under seal, 198
- Loan of money
 - breach of promise by borrower to repay, 202
 - by money-lender, rate of interest on, 116
 - by professional money-lender, revision of transactions by Court, 202
 - contract of,
 - breach of, damages for, 201
 - defined, 201
 - consumption, for, 938
 - contract of, not specifically enforceable, 201
 - deposit with bank is, 202
 - deposit as security for, 206
 - interest on, paid out of share of profits, partnership not implied from, 265
 - ultra vires* to agent applied in discharge of lawful debts of principal, 317, 318
- Lodger
 - contracting for exclusive use of specific room may sue in trespass even against landlord, 382
 - distress, goods of, protected from, 972 *n.*
- Local custom,
 - distribution of personal estate and, 1305 *n.*
 - effect of, on descent of real estate, 1302
 - gavelkind, 1297, 1302 *n.*
- Long term,
 - enlargement of, 638
 - effect of, 554
- Lord farmer. *See* "Copyhold."
- Loss
 - arising from single tort, including prospective, must be recovered in same action, 372, 373
 - caused by commission, continuance, repetition or reasonable apprehension of tort, ground for injunction, 374
 - irreparable, caused by continuance or repetition of tort, ground for injunction, 374
 - new, amounting to new tort, 373
 - present or continuous, caused by continuance or repetitions of tort, ground for injunction, 375
- Lost chattels, landowner's right to, 772
- Lunacy,
 - effect of, on marriage, 1171, 1174, 1175
 - executorship, effect on, 1331
 - of donor of power of attorney, expressed to be irrevocable, 242, 243
 - person acting in ignorance of, not liable, 241, 242
 - of principal agent determines contract of agency, 238
 - of principal, effect on authority of agent coupled with interest, 240 *n.*
- Lunatic,
 - administrator, as, 1341
 - alienation of chattels by, 976
 - contractual acts voidable, 26
 - conveyances of, 917
 - dangerous, "reception order" for, 438 *n.*
 - dangerous, restraint of, by force, 438

INDEX

- Lunatic—*contd.***
 death of testator caused by, effect on legacy to, 1277 *n.*
 deeds of, 26
 domicile, change of, by, 2
 election in relation to will, 1280
 estates of, doctrine of conversion applied to, 1360 *n.*
 general insanity recognised, in marriage of, 27 *n.*
 legal incapacity of, 2
 liability of estate of, to pay for necessities, 325 *n.*
 liability of, for tort, 347
 marriage of, void, 27
 marriage by, whether valid, 26
 partner becoming, dissolution of partnership on, 282
 partnership of, may be dissolved, 27
 property of, liable for necessities, 27
 tenant for life, powers of, 887
 torts committed by, liability for, 26, 347
 unilateral acts of, void, unless done in lucid interval, 26
 who is, a question of fact, 26
 will of, may be valid, 26 *n.*
- Machinery,**
 defect in, effect of, on employer's liability to workmen for injuries received in common employment, 447
 injury caused by defect in, liability of inventor as to, 332
 personal negligence of employer in failing to provide proper, 449
 stranger, agricultural of, cannot be distrained, 972 *n.*
 supplier of, liability of, as inviter, 355
- Magistrate**
 acting judicially, ministerial officer executing order of, when liable, 343
 torts of, in course of judicial duties, action for, not maintainable, 342 *n.*
- Maintenance. See also "Alimony."**
 affiliation order, application for, 1213 *n.*
 children and grandchildren, provision for, 1210
 definition of, 496
 divorce or nullity, after, 1199, 1200
 illegitimate children, 1210, 1212, 1213
 liability, limits of, 1211
 liability of husband for, 1181
 liability of married woman, 1211
 order for, on decree for restitution of conjugal rights or judicial separation, 1200, 1201
 parents, 1210, 1211
 separation order, under, 1198
- Maintenance, action for,**
 company in liquidation, against, 498
 damages in, 499
 defeat of plaintiff no defence, 497
 essentials of, 496
 history of, 497 *n.*
 justification, what is, 497
 motive not essential, 496
 of litigation, champerty an aggravated form of, 40 *n.*
 transactions supporting not generally enforceable, 39, 40
- Majority,**
 attainment of, 1
 legal capacity complete on attainment of, 1

INDEX

- Malice.** *See also* "Defamation, action for, malice."
 acts or omissions induced by, when amounting to tort, 335
 definition of, 335 *n.*
 essential elements of specific torts, 335
 proof of, effect of in action for libel or slander, 335 *n.*
 proof of, effect of, in action for malicious prosecution, 335 *n.*
 material in aggravation of damages, 335 *n.*
 presumption or defences rebutted by, 335 *n.*
 torts of judge committed with, action for, not maintainable, 342
- Malicious arrest,** action for, 494
- Malicious prosecution,** action of,
 corporation liable to, 494
 Court and jury, functions of, 492
 damage, proof of, not essential, 491
 damages in, 493
 definition and essentials, 488, 489—490
 legal advice, defence to, 492
 "malice," essence of, 490
 malice, when presumed, 493
 plaintiff, acquittal of, not conclusive, 489, 492
 proof of malice in, effect of, 335 *n.*
 reasonable and probable cause, 488, 490, 491
 relation to conspiracy, 482 *n.*
- Mandamus**
 against lord of manor, 593
 for breach of statutory duty, 328 *n.*
- Manor.** *See also* "Copyholds."
 conveyance of, what passes by, 690
 court baron, and, 691
 nature of, 686 *n.*
 definition, 584, 688
 demesne, conveyance of, 690
 "lord farmer" of, 585
 rights of, 689
 steward of, 585
- Manor (reputed),**
 nature of, 584 *n.*
 right of lord of, 690
- Marine insurance,**
 assignability of policy of, 305 *n.*
 form of contract of, 100
 insurable interest in contract of, time of existence of, 304, 305
 names to be inserted in policy of, 304 *n.*
 stamp in policy of, 304 *n.*
- Market (franchise).** *See* "Fairs and markets."
- Market overt,**
 chose in action, not applicable to, 980
 definition of, 946
 purchaser of goods in,
 liable to restore when, 420 *n.*
 liability of, for trover, 420 *n.*
 no personal liability of, 420 *n.*
 sale in, does not bind Crown, 947
 sale in, effect of, 946
 sale of goods in,
 by co-owner, action of trover for, 418

INDEX

- Market overt—*contd.*
 sale of goods in—*contd.*
 binding on owner though unlawful, 420
 sale of horses in, 946
- Marriage,
 annulment of, for impotence, 1176, 1177
 “authorized person” as witness, 1157
 banns, publication of, 1158
 British merchant ship, 1168
 capacity, age of, 1174
 celebration of, abroad, 1167, 1168
 Church of England rites, 1155, 1156
 common licence, 1159
 consent to, 1161—1163, 1175
 absence of, 1163
 unreasonably withheld, 1163
 deaf and dumb, of, 1155
 deceased wife's sister, of, 1173
 decree *nisi*, and, 1186
 divorced persons, of, 1196
 entries in notice book, 1160, 1161
 forbidding marriage, 1164
 forbidding, 1164
 forms of, 1155, 1156, 1157
 fraud and mistake, effect of, 1176
 gift of property with restrictions on remarriage, good, 42 *n.*
 gift of realty with restrictions against, good, 42 *n.*
 invalid, 1169—1177
 jactitation of, 1178
 Jewish rites, 1156, 1158
 language used at, 1156
 licence by registrar of marriages, 1159, 1161
 minor, effect of, on guardianship, 1218 *n.*
 notice before, 1158
 notice to superintendent registrar, 1159, 1161
 nullity of, 1186
 domicile in relation to petition for, 1204
 maintenance after, 1199, 1200
 person of unsound mind, of,
 void, 27
 whether valid, 26
 place of, 1165, 1166
 polygamy, effect of, on, 1172
 procurement of, for reward, illegal, 41
 prohibited degrees of relationship in, 1172
 promise of, breach of, damages for, 122
 prospective dissolution of, illegal, 41
 registered building, in, 1157
 registrar of marriages and, 1157
 relationship as consideration for contract, 93 *n.*
 remarriage, restraint on anticipation revived by, 45
 restrictions on, complete or undue, illegal, 41
 revocation of will or codicil by, 1246
 rights and duties arising out of, 1179—1185
 settlements, enforcement by children of covenants in, 104, 104 *n.*
 Society of Friends rites, 1155, 1158

INDEX

Marriage—*contd.*

- special licence, 1158
- superintendent registrar's certificate for, 1159—1161
- termination of, effect on restraint on anticipation, 45
- time for, 1166
- torts committed before or during, liability of married woman for, 348
- voidable, 1169—1177
- ward of Court, of, 1229
- witnesses to, 1157
- Married woman. *See also* "Defamation, action of, wife," "Wife."
 - acquisition and disposal of property by, 28—29
 - acquisition of land by, 904
 - acquisition of rights and liabilities in contract and tort, 29
 - acting as guardian *ad litem*, 29
 - acting as "next friend," 29
 - alienation of chattels corporeal by, 975
 - alienation of land by, 904
 - alienation of trust property by, 906
 - ante-nuptial contracts and torts of, liability of husband for, 58
 - authority of, as general agent of husband, when revoked, 56
 - bankrupt, when liable to be made, 29
 - concurrence of husband in disposal of property, 29, 30
 - contract by, 28—29
 - personal liability in respect of, 29
 - costs of litigation by, or on behalf of indemnity payable to trustee out of property of, 46
 - damages recovered against, in action of tort, payable out of separate property not restrained, 348
 - disclaimer and release of powers, 871, 906, 975
 - disclaimer of land by, 905
 - domicile of, 3
 - effect of judicial separation, 3 *n.*
 - election by, 906, 976
 - entail, may bar, 907
 - "general agent" of husband for necessities, if living together, 56
 - husband need not be joined in action of tort against, 348
 - lady of manor, acts as *feme sole*, 907
 - legal incapacity of, 2
 - liability in respect of pure tort, 29 *n.*
 - living apart from husband, effect on right to pledge credit, 56
 - long term, may enlarge, 907
 - minor, may appoint attorney by deed, 24 *n.*
 - necessaries, right to pledge husband's credit for, 56
 - "next friend," cannot act as, 29
 - powers of appointment, exercise by, 905
 - property, disposal of, by, may require concurrence of husband, 29, 30
 - property of, liability in respect
 - of contract, 29
 - of tort, 29
 - protector of settlement, as, 907
 - restrained income may be impounded for breach of trust, 1140
 - restraint on anticipation,
 - ceases to operate on termination of marriage, 45
 - conveyance for benefit of, may provide, 45
 - effect of, 29, 45
 - liability for costs and indemnity notwithstanding, 46

INDEX

Married woman—*contd.*

restraint on anticipation—*contd.*

may be set aside with consent of, 45

not operative until marriage, 45 *n.*

revival on remarriage, 45

tenant for life, when, 886

tort by, 28—29

tortious acts by, responsibility of husband for, 57

torts of, committed before or during the marriage, liability to be sued for
without joinder of husband, 348

trustee,

husband not liable for, 1106 *n.*

may be, 1106

Married Women's Property Acts, testamentary capacity under, 1256 *n.*

Marshalling of assets, 1398—1401

effect of Administration of Estates Act, 1833, upon, 1401

Master. *See also* "Servant," "Service."

apprentice must be

employed by, 217

taught trade or business by, 217

bankruptcy of,

discharge of indenture of apprenticeship or articles of agreement by, 218

does not determine contract of service, 215

transfer of indenture of apprenticeship or articles of agreement by, 219

cannot charge servant for medicine or medical attendance procured during
illness, 213

"common employment," doctrine of, 58, 58 *n.*

compensation for work of apprentice recoverable by, from third person, 217 *n.*

control exercised by, over servant,

evidence of, 351

question of fact, 351

death of,

contract of service determined by, 214

determines contract of apprenticeship, 218

payment for services rendered up to, 214 *n.*

premium not returnable on, 218

deduction of wages by, in respect of sickness or incapacity of, 213

determination of contract of apprenticeship by, on misconduct of apprentice, 219

dismissal of servant by, without notice or wages, when justified, 212, 213

wrongful, defences of, in action against, 214

duty of,

to indemnify servant, 210

to pay reasonable sum as reward for services of servant when no wages
agreed upon, 208

to pay wages to servant, 208

to perform consideration agreed, 208

to provide apprentice with food and medical attendance, 217

to receive servant into service, 208

to retain servant for time agreed, 208

earnings of

apprentice, right of, to, 217

servant, right of, to, as against third parties, 209

food for servant, duty of, as to, dependent on circumstances, 208 *n.*

indemnity to, by servant, 211

may determine engagement of domestic or menial servant by paying or tender-
ing month's wages in lieu of notice, 211, 212

INDEX

Master—*contd.*

- medical attendance or medicine need not be provided by, 208
- property of, protection of, in the course of employment of servant, 352, 353
- testimonial to servant need not be given by, 209
- torts of servant
 - breaking connection with, 353
 - committed for own ends, 353
 - committed in course of employment, liability for, 350, 351
 - where servant also servant of another, 352 *n.*
- tortious acts of servant forbidden by, no defence to action of tort against, 350, 351
- who is, for purpose of ascertaining liability in tort, 351
- work for servant need not be found by, 208
- wrongful exercise of discretion by servant of, liability for, 352

Master and servant. *See* "Maintenance, action for, justification."

Mental shock,

- action for, 454
- physical harm caused by, action for, 454

Mercantile Law Amendment Act, debts in relation to, 1384 *n.*

"Mere machinery," 1104

- rule against perpetuities, and, 1078—1079

Merger,

- discharge of contract by, 148, 149
- equitable rules preventing, 552
- incorporeal hereditaments, of, 672 *n.*
- rule of, 552
- equitable interests, applies to, 751 *n.*

Mesne lord, forfeiture of interest in land to, 10

- who is, 10 *n.*

Mesne profits,

- adverse possessor liable for, 767
- recovery of, by co-owner by action in nature of ejectment, 388, 389
- rights and liabilities of person liable to pay, 18, 19
- what are, 18, 19

Military offence, arrest by military officer for, 442

Military privilege. *See* "Defamation, action of, military privilege."

Miner considered as workman, 225, 449, 450

Minerals

- adjacent owners, rights of, 782
- beneath surface of land, interference with possession of, action of trespass for, 381
- not included in
 - sale of copyhold land, 187 *n.*
 - contract of sale of land under
 - Railways Clauses Consolidation Act, 1845..187, 188
 - Waterworks Clauses Consolidation Act, 1847..187, 188
- owner of surface, no right to disturb, 782
- ownership of air-space, 780
- right to work, 771
- sale of, by mortgagee apart from surface, 824
- sale of, by trustee apart from surface, 1128—1129
- unworked included in "land," 17

Mines, injunction for trespass on, order for accounts obtained as ancillary to, 378

Mining company, within stannaries,

- limitation as to number of partners not applicable to, 266, 266 *n.*
- not a partnership, 263

INDEX

- Mining, right of,
definition, 718
kinds of, 718
- Minor,
accounts stated with, void, 21
ademption of portion legacies, 1282
administrator, as, 1341
age of discretion of, 1226 *n.*
alien, domiciled abroad, 1230 *n.*
alienation of chattels corporeal by, 974
appointment of agent by, 24 *n.*
bankruptcy of, adjudication in respect of debt contracted during minority, 25
breach of condition by, works forfeiture, 900
capacity to hold and alienate land, 898
choice of guardian by, 1226
chose in action and, 981
contingent property of, power of trustees to advance, 1135 *n.*
"continuing contract" by, voidable at option after majority, 22
contract, claim on, against, cannot be converted into tort, 25
conveyance of land
by or to, voidable, 22, 898
by way of feoffment, 22
custody of,
agreements regarding, 1216
by mother, 1215
discretion of Court, in, 1226
illegitimate,
by mother, 1216
by reputed father, 1216
jurisdiction of Court regarding, 1217
remedies for unlawful interference with, 1225
removal of, by Court, 1220, 1222
settlements regarding, 1217 *n.*
under matrimonial jurisdiction, 1221
desertion of, by parent, 1227
disagreements affecting welfare of, 1229
domicile,
change by, 3
of illegitimate, 3
of legitimate, 3
when orphan, 3
election by, 1280
employment, contract of, binding on, 21 *n.*
exercise of patronage by, 899
exercise of statutory powers by guardian or trustee, 901, 902
felon, custody of, 1222
female, removal from guardianship of parents, 1222
goods supplied, contracts by, for, void, 21
guardian
in socage of, 1217, 1231
may be appointed by, 25 *n.*, 1218 *n.*
of, appointment of, by will, 1216 *n.*, 1218, 1219
of, removal of, 1220
guardianship of,
by father, 1215
by mother, 1215

INDEX

Minor—*contd.*

- legacies to, 1233, 1234, 1272
- legal incapacity of, 2
- legal proceedings by and against, 1230
- liability of,
 - in equity to restore property obtained by false representation, 348
 - in tort, 347
 - for fraudulent representation, 347, 348
 - to pay for necessities, 325 *n.*
 - when claim arising out of contract converted into claim in tort, 347 *n.*
- lord of manor, may act as, 901
- management of land of, 902, 903
 - by trustees, 1233 *n.*
- marriage of,
 - absence of consent to, 1163
 - consent by Court, 1162
 - consent necessary to, 1162, 1163
 - effect on guardianship, 1218 *n.*
 - evidence of consent to, 1163
 - procured by false oath, 1163
- marriage settlement by, 899, 975
 - at what age made, 23, 24
 - exercise of power of appointment in, 23, 24
- married woman, may appoint attorney by deed, 24 *n.*
- may act as agent, 24
 - executor, 25
 - guardian, 25
 - witness, 25
- money paid under void or voidable contract, when recoverable, 23
- necessaries supplied to, what are, 21, 22
 - validity of contracts entered into for, 21
- offences against, 1223
- office, proprietary, may be held by, 900
- power of appointment,
 - exercise of, 898, 899
 - of chattels, exercise of, 974
- power to convey in gavelkind, 898 *n.*
- presentation to benefice by, 1233 *n.*
- property of, power of parents over, 1232
- ratification of contracts by, after majority, not enforceable, 24
- real estate of, 1231
- reasonable time for revoking continuing contract a question of fact, 22
- religion of,
 - choice of, 1227—1228
 - discretion of Court in, 1228—1229
- repayment of money, contracts for, entered into by, void, 21
- services of, father entitled to, 1234, 1235
- subrogation of lenders of money to, 23, 23 *n.*
- tenant for life, when, 884
- tortious act of,
 - by wrongful detention of goods under contract, plea of infancy in defence to action for, 347
 - indirectly connected with contract, plea of infancy no defence to action for, 347
 - really arising out of contract, 25
- torts, liability of, for, 25

INDEX.

Minor—*contd.*

- trustee, may be, 25, 1106
- ward of Court, as, 1229, 1230
- will, usually cannot make, 974, 1243

Misappropriation,

- bailee obtaining possession by deceit with intention of, 409 *n.*
- of chattels personal by deceased, when personal representative liable for, 364

Misconduct,

- by agent, commission due forfeited by, 236
- concealment of, illegal, 41
- injury caused to workman by serious and wilful, employer not liable to pay compensation for, 455
- justifying dismissal of servant without notice or wages, what is, 213, 213 *n.*
- of partner, dissolution of partnership decreed on ground of, 283

Misdemeanour,

- arrest for, when justified, 437 *n.*
- past, arrest for, without warrant, when justified, 437 *n.*

Misrepresentation. *See also* "Fraud."

- by minor,
 - liability in equity to restore property, 347, 348
 - liability in tort, 347, 348
- consent to battery obtained by fraudulent, liability of defendant in trespass, 433
- mistake of fact, induced by, when cause of avoidance of transaction, 38
- non-disclosure not amounting to, 39
- of material facts to surety renders guarantee void, 292
- specific performance refused on ground of, 126
- what amounts to, 39

Mistake,

- alteration in written document by, 149
- bonâ fide* of servant, in committing unlawful act, on authority of master, 352
- common, when transaction avoided by, 37
- effect of, on marriage, 1176
- involving hardship, refusal of specific performance on ground of, 38, 126
- money paid under, when recoverable, 39
- of fact,
 - induced by misrepresentation, avoidance of transaction by, 38
 - money paid under *bonâ fide*, recovery of, 318
 - no defence to action for false imprisonment, 443
 - transaction avoided by, 37
 - transaction not avoided by, 37
 - transaction not specifically enforced, 37, 38

"Mixed fund,"

- creation of, for discharge of debts, 1394
- legacies chargeable on, 1397

Money

- borrowed by agent in excess of authority, effect of application of, in discharge of debts of principal, 317, 318
- charged on land,
 - barred by period of twelve years, 73
 - personal action on, barred by period of six years, 73 *n.*
 - title of person claiming, not extinguished by limitation of action, 80
- deposited as stake with other party, recovery of, 310
 - with stakeholder, recovery of, 310, 320, 321
- due under statute, custom or official duty, recovery of by action, 323, 324

INDEX

Money—*contd.*

- entrusted for particular purpose, recovery of, before holder parting possession with, 321
- fraudulently or forcibly obtained, recovery of, 319, 321
- had and received, representatives of deceased partner not liable to action of, for goods delivered after death of partner, 269 *n.*
- lent, accounts stated in respect of, interest on, 118
 - for purpose of gambling, securities for, 313
 - to borrower to make bets, recovery of, 312 *n.*
 - to enable borrower to pay lost bets, recovery of, 312 *n.*
- loan of,
 - breach of contract of, damages for, 201
 - breach of promise of borrower to repay, 202
 - by customer to banker, 202
 - by professional moneylender, revision of transaction by Court, 202
 - contract of, defined, 201
 - not specifically enforceable, 201
 - must be produced on tender of payment, 107
 - not included in term "goods," 161
 - of partnership, property bought with, 275
 - of third party, misapplied by partner, liability of firm to make good loss, 270
 - paid by surety, interest on, 118
 - paid in respect of executory considerations, recovery of on total failure of consideration, 320
 - paid on wager, not recoverable, 312
 - paid to defendant's use, 317
 - paid under *bonâ fide* mistake of fact, recovery of, 318
 - paid under mistake, when recoverable, 39
 - received by insured from third party in respect of loss, may be recovered by insurers, 318
 - received on wager by agent, recoverable by principal, 312
 - received to plaintiff's use, recovery of, 318, 319, 320, 321
 - tender of, accompanied by production of money, 107
- Money bond. *See* "Bond."
- Moneylender, rate of interest on loans by, 116
 - transactions with, revision of by Court, 202
- Monopolies, unlawful, 1015. *See also* "Patent."
- Month. *See* "Time."
- Morality, act or forbearance contrary to, no consideration, 95
- Mortgage. *See also* "Land, mortgage of."
 - agreement to create, not included in contract of sale of land, 193
 - company, by, when registration necessary, 1070, 1071
 - debt, purchaser of equity of redemption must indemnify vendor in respect of, 317 *n.*
 - given as security for gambling debt, 313
 - indemnification of, for moneys expended in preservation of mortgaged property, 324, 325
 - interest of deceased mortgagee
 - in personal estate, how passing, 1354
 - in real estate, how passing, 1354
 - liability for satisfaction of, on succession, 1396
 - personal representative, by, setting aside of, 1406
 - real estate, passes to personal representative, 1354
 - redemption of, cannot be excluded, 49, 815
 - statutory power of tenant for life to, 880
- Mortgagees, purchasers from, when joint account clause, 190 *n.*

INDEX

- Mortgagor,
 - mortgagee's title, and, 759
 - occupation of, tenancy at will, 642
- Mortmain, rule of,
 - applicable to corporations, 556
 - equitable interests in land, applies to, 751 *n.*
 - mesne lords and forfeiture, 909, 910
 - stated, 865
- Movables,
 - easement cannot be affixed or imposed on, 18
 - extent of material object included in, question of fact, 18
 - franchise cannot be affixed or imposed on, 18
 - profits cannot be affixed or imposed on, 18
 - purchaser of, may be restrained in use of, by contract, 18
- Murder, trespass to land to prevent commission of, justifiable, 385
- Mutual dealings, effect of, when account stated, 322
-
- "Natural rights of property"
 - in riparian owner, 710 *n.*
 - nature of, 705 *n.*, 706 *n.*
- Necessaries,
 - goods not, guarantee of infant's debt for, 291 *n.*
 - liability of estate of lunatic for, 27, 325 *n.*
 - of minor for, 325 *n.*
 - supplied to minors, 21
 - validity of contract for, 21
 - what are, 21, 22
 - wife may pledge husband's credit for, 56
- Neglect,
 - death of person caused by, right of personal representatives to sue party liable for, 362, 363
- Negligence,
 - action for, defeated by proof of contributory negligence in plaintiff, 445 *n.*
 - action founded on, what plaintiff must show in, 329
 - contributory,
 - action of tort will fail when damage decisively caused by, 333
 - defence of, open to employer sued under Employers' Liability Act, 450
 - of person in charge of child of tender years, 333
 - plaintiff not guilty of, 333
 - proof of, effect of, in action of negligence, 445 *n.*
 - damage caused by, when presumed, 330
 - defined, for purposes of law of tort, 329
 - evidence of, whether facts alleged are, question of law, 330
 - in act or omission giving rise to action for tort, 329, 329 *n.*
 - inducement to child to commit act of damage amounting to, 334
 - inference of, from facts alleged as evidence of, question of fact, 330
 - innkeeper exercising lien, not answerable for loss in absence of, 247 *n.*
 - justifiable, if act done in obedience to more pressing duty, 335
 - of agent, forfeiture of commission due to by, 236
 - of child of tender years, 334
 - of contractor or servants, liability of employer for, 355
 - of defendant in conjunction with act of stranger, when defendant liable for, 334
 - of employee in charge or control of signals, locomotive engines, etc., liability of employer for, 448
 - of employee to discover or remedy defects in machinery plant, etc., 447

INDEX

Negligence—*contd.*

- of guest at inn causing loss of his goods, 245
- of owner causing loss of goods entrusted to common carrier, 250
- of superintendent engaged by employer, workman injured by, liability of employer for, 447
- of trustees and executors does not give rise to action of tort, 335 *n.*
- personal, of employer,
 - workman injured by, liability for, 447
 - what constitutes, 449
- physical harm caused by, action for damages for, 445
- proof of, necessary
 - to determine liability on trespass to land adjoining highway by domestic animal, 358
 - to make defendant liable for damage of unusual kind done by domesticated animal, 359
 - to make owner liable for damage committed by dog, 360
- proof of, not necessary
 - to make owner of dog injuring cattle liable, 359
 - to make person keeping dangerous animal liable for damage, 360, 361
 - to make person keeping or harbouring dangerous things liable in damages for physical injury caused by them, 453

"Negligence,"

- treatment of, 545—546

Negotiable instrument,

- accord and satisfaction by, 151
- assignment of, 143
- conditional payment by, 173—174
- delivery of, as *donatio mortis causa*, 1292
- deposited as cover for wager, 311
- discharge of, 145
- liability on, 63
- signature in partnership name, 63
- signature in trade name, 63

New trial, on unreasonable award of damages, 371, 372

"Next friend," married woman cannot act as, 29

Next presentation. *See* "Advowson."

Noise, unusual or excessive, production of, a nuisance, 401

Non-tidal water, occupier's rights in, 770

Non Intromittas, writ of, 686 *n.*

Non Omittas, writ of, 686 *n.*

Notice,

- assignment of right against debtor incomplete without, 142
- by carrier in respect of increased charges for carriage of valuables, 253
- by seller of stoppage *in transitu*,
 - effect of, 178
 - requirements of, 178
 - to whom given, 178
- by unpaid seller to buyer of intention to resell goods, 179
- dismissal of servant without, when justified, 212, 213
- engagement of domestic or menial servants determinable on month's, 211, 212
- gratuitous service may be determined without, 213
- limitation of liability by railway and canal company in respect of carriage of goods by, 257
- of abatement by party injured to wrongdoer, when necessary, 399, 400
- of accident and claim under Workmen's Compensation Act condition precedent to proceedings to recover, 459

INDEX

Notice—*contd.*

- of assignment,
 - debtor discharging liability before, 142
 - priorities of, 142
- of breach of trust by partner trustee, liability of co-partner on, 271, 271 *n.*
- of default of principal debtor not condition precedent to liability of surety, 294
- of intention to dissolve partnership given by partner, 281
- of partner acting in defiance of agreement, persons having, cannot sue firm, 269
- of qualities rendering use of goods dangerous when goods intended to be used for particular purpose, 331
- personal services, party disabled from performing contract must give, 131 *n.*
- purchaser without, of negotiable instrument deposited as cover for wager, 311
- reasonable,
 - determination of engagements by, 212
 - what is, to determine engagements affected by usage, 212
 - in determining engagements, a question of fact, 212
- to creditor, revocation of continuing guarantee by, 293
- to partner, how far notice to firm, 272

Nuisance,

- abatement of,
 - and injunction for, 392 *n.*
 - by commoner, 398
 - by unsuccessful applicant for mandatory order to destroy, 398 *n.*
 - must be done peaceably, 399
 - notice of, by party injured to wrongdoer, when essential, 399, 400
 - order of, 392 *n.*
 - private, 398
 - entry upon land for, 398
- public,
 - by person, when permissible, 400
 - caused by obstruction on highway, 400
 - rights of third parties must not be infringed by, 399
 - without notice, when permitted, 399, 400
- act committing, done under claim of right, suit by reversioner in respect of, 396
- action
 - for private, caused by alleged obstruction of highway through non-feasance, 404 *n.*
 - of, annoyance, prejudice or disturbance amounting to trespass no bar to, 391
 - by commoner on excessive exercise of lord's right, 398
 - by occupier of land affected by, 395
 - by remainderman, when maintainable, 396 *n.*
 - by reversioner, when maintainable, 395, 396
 - defeated by defendant proving prescriptive right to do acts complained of, 395
 - in respect of private, 392
 - public, when maintainable, 392
 - not maintainable when annoyance caused by proprietary rights in land, 393
 - apprehended, injunction to restrain, 401
 - assise of, 391 *n.*
 - besetting or watching approaches to house a, 402
 - buildings or fences allowed to fall into dangerous condition a, 404
 - causing crowds to assemble a, 402

INDEX

Nuisance—*contd.*

- continuance of, restrained by injunction or mandatory order, 400, 401
 - continuing,
 - action for, by occupier of land, 395
 - fresh right of action for, from day to day, 372 *n.*
 - on land let or sold, liability in respect of, 397
 - creator of,
 - liability of, 396
 - occupier of land presumably is, 396
 - damage caused by, estimate of, 393—394
 - damages for, measure of, when plaintiff a public body bound to restore, 398
 - defences to, invalid, what are, 394
 - defined, 391
 - determination of, 393—394
 - diminution in value of plaintiff's property not *per se* a, 392
 - entertainments, unlicensed, maintenance of, a, 404
 - examples of specific, 401, 402, 403, 404
 - explosive or inflammable substances, harbouring or exposing of, a, 402
 - extent of, diminution in value of property as evidence of, 392
 - failure to repair causing, liability of lessor in respect of, 396
 - fouling or substantially diminishing water supply a, 402
 - immorality, public display of acts of, a, 404
 - indecentry, public display of acts of, a, 404
 - indecent literature, public display of, a, 404
 - infectious diseases, harbouring or exposing of cases of, a, 402
 - injunction or mandatory order against continuance or for removal of, 400, 401
 - injunction to restrain commission of apprehended, 401
 - interference, substantial, with enjoyment of
 - easement a, 403
 - local right a, 403
 - profit à prendre* a, 403
 - interference with lateral or vertical support of land a, 402
 - justified, when, 393
 - lessor contracting expressly with lessee to abolish, effect of, 397 *n.*
 - maintenance of scandalous or riotous premises a, 404
 - noise, unusual or excessive, a, 401
 - noxious smells, emission of, a, 401
 - obstruction to, or danger to use of, highway or public bridge a, 403
 - occupier's predecessor in title causing, when occupier liable for, 397
 - private,
 - action in respect of, 392
 - trespass on land to abate justifiable, 385
 - public,
 - abatement of, by person, when permissible, 400
 - action in respect of, 392
 - caused by obstruction on highway, abatement of, 400
 - no prescriptive right to commit, 395 *n.*
 - remedies for, 391 *n.*, 392 *n.*
 - removal of, by injunction or mandatory order, 400, 401
 - to common right caused by excessive exercise of lord's right, remedy for, 398
 - water caused to overflow on to plaintiff's land a, 404
- Nullity of marriage, 1186, 1197
- domicile in relation to petition for, 1204
 - maintenance after, 1199, 1200

INDEX

- Obligation,
 - breach of duty creating, tort is, 326
 - contract must contain intent to create, 85, 86, 87
 - legal, to pay sum ordered in judgment, 322
 - quasi-contractual, 315
 - breach of, consequences of, 316
 - distinguished from contract and tort, 315 *n.*
 - enforcement of,
 - by specific performance, 316 *n.*
 - by action of assumpsit under old law, 316 *n.*
 - nature of, 315 *n.*
 - sum payable on failure to perform, treated as penalty, 138 *n.*
 - to pay indemnity, when money paid or act done
 - under threat of legal action, 317
 - voluntarily, 317
- Offer and acceptance,
 - acceptance, by conduct of general offer, 91
 - binding, when, 88
 - by post, effect of, 90
 - communication of, 88
 - complete, when, 89—90
 - ineffectual if conditional, 90
 - lapse of, by death of either party, 88
 - by counter offer by offeror, 88
 - by failure to accept within given time, 88
 - by refusal of offeror to accept, 88
 - mode of, 90
 - revocation of,
 - by express intimation, 89
 - by implication, 89
 - by liability of offeror, 89
 - time for, 88, 89
- Office (proprietary),
 - alienation of, 743
 - definition, 741
 - deputy, appointment of, 743
 - discharge of incumbent, 742
 - equitable patron presents, 755
 - reversionary, 742
 - tenure, conditions of, 743
- Officers,
 - ministerial, executing order of Court or magistrate acting judicially, when liable, 343
 - of corporation, torts of, committed in course of employment, corporation liable for, 346
 - unincorporated association liable for wrongful acts of its, 6
- Omission,
 - amounting to tort, appreciable damage in fact must be caused by, 326
 - malicious, when amounting to tort, 335
 - may be both breach of contract and tort, 336
 - physical harm caused by intentional or negligent, liability in damages for, 445
- Onerous property, disclaimer of, by trustee in bankruptcy, 860, 861
- Option to purchase, exercise of, effect of, 1360
- Order,
 - for account, when granted, 378

INDEX

Order—*contd.*

- interlocutory,
 - conditions imposed by Court granting, 376 *n.*
 - injunction by way of, for continuance or repetition of tort, 375
 - mandatory injunction by way of, to prevent tort, when granted, 376 *n.*
 - when granted, 375 *n.*
 - in cases of libel, 375 *n.*
- mandatory,
 - against continuance or renewal of, 400, 401
 - to prevent tort, when granted by Court, 376
- Order and disposition, chattels corporeal, of, 969, 970
- chose in action, and, 982 *n.*
- Orphan, domicile of, 3
- Outgoings paid by vendor of land until possession taken by purchaser, 188
- Outlawry, effect on testamentary capacity, 1256 *n.*
- Outlaws,
 - legal incapacity of, 2
 - goods of (franchise), nature of, 692
- Outworker, not a "workman" under Workmen's Compensation Act, 458
- Ownership. *See also* "Joint ownership."
 - act of, unjustifiable exercise of, constituting conversion, 414, 415, 416
 - conveyance vesting legal and equitable, in purchase, duty of vendor to execute and procure execution of, 188
 - duty of purchaser to take possession so as to relieve vendor of future liabilities incident to, 190
 - of land, absence of incidents of, contract not specifically enforceable, 187 *n.*
 - rights of *usque ad cælum et ad inferos*, implied in contract of sale of, 187 *n.*
- Ownership of chattels,
 - acquired, how, 936
 - cannot be limited, 927
 - liabilities of, 930
 - remedies for protection of, 929
 - successive interests in, 927, 928
- Packers, lien of, 961
- Pannage, right of, definition, 717
- Paraphernalia, nature of, 933
- Parent,
 - chastisement by, delegation of authority as to, to schoolmaster, 437 *n.*
 - child employed as agent, liability for acts of, 58 *n.*
 - control of, over minor's property, 1232
 - definition of, 1227 *n.*
 - grand-, of deceased workman "dependants" for purposes of compensation, 462
 - of deceased, action by personal representatives for benefit of, 363
 - step-, of deceased workman "dependants" for purposes of compensation, 462
 - torts by child, responsibility for, 57, 58
- Parliamentary privilege. *See* "Defamation, action of, parliamentary privilege."
- Particular estate. *See* "Reversion," "Remainder."
- Parties to contract, 103
 - description of, 101
 - duty of performance by, 105
 - must be definite persons, 103
 - oral evidence admissible to identify, 101
 - performance due by, how determined, 105
 - sufficiency of description, 101
- Partition. *See also* "Common ownership."
 - statutory power of, by tenant for life, 878

INDEX

- Partition Act, 1868, sale of land under, 1360
- Partner. *See also* "Partnership."
- access to and inspection of books of partnership by, 278
 - account of separate profits must be rendered to partnership by, 279
 - act or instrument done or executed in firm name by persons authorised binding on, 268
 - acting in defiance of agreement, firm not bound by, with respect to persons having notice, 269
 - acts of, in ordinary course of business bind firm and other partners, 268
 - admission by, evidence against firm, 272
 - advances or payments by, beyond amount of capital subscribed, interest on, 277
 - agent of firm for purpose of business of partnership, 268
 - assignee of share of,
 - on dissolution of partnership, 281
 - position of, 280
 - as trustee employing trust property in partnership, 271
 - bankruptcy of,
 - determination of authority by, 285
 - liability of person representing himself as co-partner after, 285
 - benefits received by, from competing business, must be accounted for by, 280
 - bound to render true accounts and full information of things affecting partnership to any partner or representative, 279
 - breach of partnership agreement by, dissolution of partnership decreed on ground of, 283
 - change of, continuing guarantee revoked by, 273
 - concurrence of, in notice of dissolution or retirement, 284
 - death of,
 - dissolution of partnership by, separate profit made after must be accounted for, 279, 280
 - goods ordered before, but delivered after, 269 *n.*
 - increase of liabilities of estate after, 269 *n.*
 - death or bankruptcy of, partnership dissolved by, 281, 282
 - deceased, purchase-money of share of, a debt, 288
 - duty of, as to application of partnership property, 274
 - entitled to share equally in capital and profits of business, 277
 - estate of bankrupt, liability of, for debts contracted after bankruptcy, 284
 - estate of deceased
 - liable for debts and obligations of firm, 269
 - liability of, for debts contracted after death of, 284
 - not entitled to further profits on purchase of by continuing partners, 287—288
 - of outgoing, not entitled to further profit on purchase of by continuing partners, 287—288
 - of retired, liability of for debts contracted after retirement, 284
 - execution against partnership property for debts of, 276
 - expulsion of, by majority of partners, when permissible, 278
 - giving notice of intention, may determine partnership, when no term fixed, 278, 279
 - incapacity of, Court may decree dissolution on ground of, 282, 283
 - incoming, liability of, 272
 - indemnification of, by firm, 277
 - innocent, right of, on rescission of partnership contract,
 - to be indemnified by persons guilty, 286, 287
 - to lien on surplus assets, 286
 - to stand in place of creditor for payments made, 286

INDEX

Partner—*contd.*

- interest on capital subscribed by, before ascertainment of profits, 277
- interest of, in partnership property,
 - account of, 276
 - appointment of receiver of, 276
 - charge of, 276
 - redemption of, by other partners, 276
 - sale of, 276
- introduction of person as, must be with consent of all existing partners, 278
- joint and several liability of,
 - for liabilities of firm, 357 *n.*
 - for torts, 270
- legal title of property bought with partnership funds, vests in, 275 *n.*
- lender of capital receiving share of profit as interest not necessarily a, 265
- liability of
 - estate of deceased, for partnership debts, when business continued in old firm name, 271, 272
 - for debts and obligations of firm, 269
 - for representations as to credit of another person, 350 *n.*
 - person representing himself to be, 271
 - to contribute to losses of business equally with other partners, 277
- lunacy of, dissolution of partnership decreed on, 282
- management of partnership business by, 277
- misapplication of property of third person by, liability of partnership for, 270, 356, 357
- misconduct of, dissolution of partnership may be decreed on, 283
- notice to, how far notice to firm, 272
- number of, in partnership, 266
- of trustee, liability of, for breach of trust, 271
- outgoing,
 - interest on capital of, 287
 - leaving capital in business, 287
 - when continuing partners have option to purchase share, 287
 - purchase-money of share of, a debt, 288
- person receiving debt out of profits not necessarily a, 264
- person receiving share of profits is not necessarily a, 264
- personal liability of, on pledging credit of firm for purpose outside business, 269
- pledging credit of firm for purpose outside business, firm not bound by, 269
- premium paid by, when returnable on dissolution, 286
- remuneration of, for acting in partnership business, 277
- representation by, evidence against firm, 272
- retiring, liability of,
 - after, 283, 284
 - for breach of trust by co-partner, 271 *n.*
 - before, 273
 - release of, by agreement, express or implied, 273
- rights and obligations of, continue after dissolution to wind up, 284, 285
- rights *inter se*, rules applicable to, 276, 277, 278
- servant or agent paid according to profits, not necessarily a, 264
- share of, charged for separate debt, partnership dissolved by, 282
- torts of, liability of firm for, 270
- trust moneys employed in business of firm with knowledge of, liability of, after retirement, 271 *n.*
- unauthorised acts of, when not binding on firm, 268

INDEX

Partner—*contd.*

- variation of rights and duties of, by consent of all partners, express or implied, 273, 274
- vendor of goodwill receiving annuity out of profits not necessarily a, 265
- who may become a, 267
- widow or child of deceased, receiving annuity out of profits not necessarily a, 264
- wrongful act or omission by, causing loss or injury to third person, liability of firm for, 356
- Partnership. *See also* "Dissolution of partnership"; "Partner."
 - affairs, right of partner to account of, 279
 - assets, distribution of, on dissolution, 285, 288, 289
 - books must be kept at place of business of partnership, 278
 - partner may have access to, and inspect, 278
 - business,
 - differences connected with, may be decided by majority of partners, 278
 - management of, every partner may take part in, 277
 - nature of, cannot be changed without consent of all existing partners, 278
 - partner acting in, no right to remuneration for, 277
 - change of, effect of on liability of surety, 300
 - notice of, in *London Gazette*, 283
 - persons dealing with, after, 283
 - contract of,
 - avoidance of, by infant partner, 267
 - breach of, dissolution by Court on, 283
 - rescission of, for fraud, right of innocent partner on, 286
 - when required to be in writing, 267
 - defined, 262
 - determination of, when no term fixed, by partner on giving notice of intention, 278, 279
 - existence of,
 - how determined, 262
 - not implied
 - by receipt of share of profits as interest on loan, 265
 - from co-ownership, 263
 - from payment of annuity out of profits to vendor of goodwill, 265
 - from receipt of annuity out of profits by widow or child of deceased partner, 264
 - from receipt of debt out of profits, 264
 - from remuneration of servant or agent according to profits, 264
 - from sharing of gross returns, 263
 - from sharing of profits, 264
 - goodwill, vendor of,
 - may not solicit customers of old business, 289
 - not prevented from carrying on competing business on sale of, 289
 - interest in land belonging to, treated as personalty, 275
 - land, devolution of legal estate in, 274
 - liability of, for misapplication of property of third person by partner, 356, 357
 - minor in, 267
 - name, 262
 - use of, after partner's death, 271
 - negotiable instrument signed in name of, liability of partner for, 63
 - number of partners in, 266
 - of person of unsound mind may be dissolved, 27
 - partners "general agents" of, 55

INDEX

Partnership—*contd.*

- personal representative's claim to share of property, 1353
- profits of land not held in, purchase of land out of, 275
- prolongation of, 279
 - inferred from continuance of business, 279
- property,
 - application of, 274
 - bought with funds of, 275
 - vesting of legal estate of, in partners, 275 *n.*
 - execution against, for debts of partner, 276
 - interest of partner in, 276
 - rights of partners *inter se* in regard to, 276, 277, 278
 - real estate of, passing to personal representative, 1355
 - relating to land, agreement to retire from, 267 *n.*
 - relation between members of company or association not a, 262, 263
 - share of partner in, position of assignee of, on dissolution, 280, 281
 - terms of, may be varied by consent of all partners, express or implied, 273, 274
 - winding up by Court, 285
- Part owner,
 - sale of goods, contract for, by, 161
- Part ownership,
 - existence of partnership not implied from, 263
- Part payment,
 - earnest treated as, on performance, 136
 - where contract unenforceable, 99
- Part performance,
 - acceptance of, waiver of rights by, 135
 - by one party, right to demand partial or entire performance from other, 135
 - of contract not in writing, effect of, 98—99
- Passengers,
 - carrier of, duty of,
 - to exercise reasonable care and skill, 258—259
 - to furnish fit vehicle, 258
 - safety of vehicle not warranted by carrier of, 258—259
 - security of, not warranted by carrier of, 258—259
- Passing off action, 1028
- Pastime, customary right of, 746
- Patent,
 - abuse of, 1019 *n.*
 - assignment of, 1020
 - Crown bound by, 1017
 - definition of, 1015
 - duration of, 1015
 - expired, and trade mark, 1029 *n.*
 - infringement of, 1016
 - account in lieu of damages for, 379 *n.*, 426
 - damages for, 426
 - injunction to prevent, 426
 - remedies for, 1016
 - threat of proceedings for, ground for action for damages and injunction, 426 *n.*, 427 *n.*
 - lapse of, 1019
 - license for, 1017
 - licenses of right, 1018, 1019 *n.*
 - restoration of, 1019

INDEX

- Patent—*conid.*
 revocation of, 1018
 "threats action" for, 1016
- Patent articles, conditions of dealing may be restricted, 927
- Patronage. *See* "Advowson."
- Pauper, injury suffered by, in course of work, action for, against board of guardians not maintainable, 343, 344
- Pawnbrokers, statutory rules affecting, 958
- Payment. *See also* "Debts"; "Part payment."
 appropriation of,
 by creditor of several debts, 113, 114
 by debtor owing distinct debts to one person, 113
 disproportionately, 114
 in order of date, 114
 by partner in advance of capital subscribed, interest on, 277
 conditional, by negotiable instrument, 173—174
 demand of, interest from, 117
 discharge of right of action by, 151
 for work done, 221, 222, 224
 in advance,
 innkeeper may demand, 244
 of charge, right of carrier to, 250
 of lesser sum in satisfaction of debt accrued due, debt discharged *pro tanto* by, 154
 of price and delivery of goods concurrent conditions, 168
 of wages, place of, 226
 tender of, 106, 107, 108, 109
 conditional on giving receipt, 109
 money debt, effect of failure to accept, 106
 must be in medium authorised by law, 107
 production of money on, 107
 refusal on specified ground, 108—109
 to one joint promisee, liability of promisor to others discharged by, 157
 to one of co-trustees, 158 *n.*
 voluntary, for another, indemnity for, 317
- Payment into Court by debtor, 1050
- Peerages considered as incorporeal hereditaments, 16
 considered as things real, 15
- Penal actions, time limit, 989
- Penalty,
 contract to pay, for non-performance of impossibility, amounts to mere voluntary promise, 140
 for breach of condition not enforceable, 50
 illegality induced by, renders contract void, 139
 injunction granted notwithstanding agreement as to, 139
 larger sum on failure to pay smaller is, 138
 large sum payable for breach of trivial promise of uncertain value treated as, 139 *n.*
 not recoverable, 137
 or liquidated damages,
 decision of Court as to, with reference to intention of parties, 137
 language immaterial in determination of, 138
 paid to workman in respect of same injury, employer may credit, in assessing damages under Employers' Liability Act, 1880..452
 same provision for different breaches constituting, 138
 specific performance decreed notwithstanding agreement as to, 139

INDEX

Penalty—*contd.*

sum payable by agreement on failure to perform pecuniary obligation is, 138 *n.*
time limit for, 988

Pension. *See* "Annuity."

Perambulation of boundaries, customary right of, 747

Performance,

action for breach of contract brought before due, 121
alternative, election of, 110
antecedent request or demand may be a condition to, 115
as condition precedent, 146
assignee may demand from debtor notwithstanding want of consideration, 142
by agent or servant, 110
by one party, whether contract discharged by agreement subsequent to, 145
complete, waiver of, by acceptance of part, 135
conditional

on concurrence of third parties, 107

on request or demand, 115

condition precedent to demand for, 134

delay in, when time not essence of contract, 148

discharge of contract by, 144

tender equivalent to, 144

earnest

forfeited on failure of, 136

returned on failure of, 136

security for, character of, 136

treated as part payment upon, 136

enforcement of, by joint promisees, 157

failure of, 120

impossibility of,

by reason of death, 130

by reason of illness, 130

contract for personal services, notice by disabled party, 131 *n.*

effect of, 320 *n.*

inability not amounting to, 132, 133

in fact,

contract not rendered void by, 129

effect of knowledge of, 129

in part, effect of, 132

one of two alternatives, 131

after choice made, 131, 132

liability of promisor to perform other, 131

incomplete, compensation in respect of, 135

interdependent, of reciprocal promises, 134

liability for, of co-promisors, 154

must be complete and in terms of contracts, 105

of impossibility, bond conditioned for, 140

of contract,

by parties to it, 105

character and extent of, how determined, 105

dependent upon concurrence of party, 106

earnest given as security for, 136

impossible

in law, 129

in nature, 129

impossibility

arising from foreign law, 129

INDEX

- Performance—*contd.*
 of contract—*contd.*
 impossibility—*contd.*
 known to one party only, 129 *n.*
 of, eventual, 130
 due to alteration in law, 130
 intention of parties foreseen as to, 130
 of, supervening, presumed intention of parties as to, 130
 tender of, effect of failure to accept, 106
 what amounts to, 106
 of impossibility, contract to pay penalty on failure of, amounts to mere voluntary promise, 140
 of independent reciprocal promises, 134
 of reciprocal interdependent promises, order of, determined by Court, 134, 135
 part,
 absence of writing, in, effect of, 98—99
 acceptance of, waiver by, 135
 effect of, 135
 party disabling himself from, contract may be determined by, 120
 party temporarily disabling himself from, contract not broken by, 120 *n.*
 personal representatives of deceased creditor may enforce, 111
 place of,
 fixed by contract, 111
 when creditor without the jurisdiction, 111
 reasonable time for, question of fact, 112
 time for, limitation of reasonable, 148
 time of,
 when fixed, 112
 when not fixed, must be within reasonable, 112
- Perpetuities, rule against,
 child *en ventre*, and, 25
 conditions, applies to, 795
 covenants for renewal, and, 616
 definition, 1073
 equitable interests, applies to, 751
 future interests in land, 662
 incorporeal hereditaments, applicable to, 672 *n.*
 interests not within, 1076—1077
 interests subject to, 1074—1076
 powers of appointment, and, 877, 1077
 powers to enforce charges, does not apply to, 838
 qualified restriction against alienation and, 44
 restrictive covenants not within, 806
 trusts for animals within, 1098
- Personal estate,
 beneficiary must account for debts owed, 1311
 conversion of, 1356, 1357
 Crown's right of administration of, 1338
 devolution of, effect of domicile on, 1306
 distribution of,
 age and sex in relation to, 1309
 creditor's right to follow assets after, 1367
 local custom affecting, 1305 *n.*
 mode of reckoning degrees of kindred, 1308
 parental rights, 1308
 representation in, extent of, 1307

INDEX

- Personal estate—*contd.*
distribution of—*contd.*
rules of, 1306-
undisposed, 1305
estate *pur autre vie*, when devolves as, 1312
husband's rights in wife's personalty, 1314, 1315
payment of debts out of, 1391, 1393
effect of trust or charge for, 1385
payment of legacies out of, 1374
undisposed of, payment of debts out of, 1391
- Personalty,
corporation sole cannot generally acquire, 10
defined, 16
included in term "goods," 161
interest in land belonging to partnership treated as, 275
of corporation vests in Crown on dissolution, 13
of deceased person, Crown suits in respect of, barred by lapse of time, 79
recovery of, barred by period of twenty years, 72
restraint on alienation attached to absolute ownership of, 43
unincorporated associations cannot own, 5
whether term includes choses in action, 14
- Personal representative. *See also* "Co-representative."
action by,
for damages suffered from death of deceased, time for, 363
for trespasses committed during lifetime of deceased, 410 *n.*
admission of assets by, 1418, 1419
allowance of claims and compromises by, 1411
appropriation to meet legacies, 1412
arrears of rent passing to, 1354
assent to devise or legacy, 1268, 1269
assignee of lease, of, duty and liabilities of, 1365
choses in action pass to, 1362
co-ownership of, 1349
damages, power to sue for, 1363
damages recovered by, for loss suffered from death of deceased, 363
definition of, 1329
distribution of assets by, after advertisement, 1390
estate *pur autre vie* passes to, 1353 *n.*
exercise of powers by, 873
fiduciary ownership of, 1349
circumstances rebutting, 1550
funeral arrangements by, 318, 1402
heirlooms and fixtures passing to, 1355
indemnity of, 1415
limited, 1416
restrictions on, 1416
subrogation by creditors, 1417
insolvent estate administered by, 1387
inventory of estate of deceased by, 1402
investing deceased's money, no liability for, 1404
lessee, of,
entering on land, personal liability of, 1365
option to purchase, how passing, 1354
lessor of, liability to lessee, 1364
liability of,
limitation of, 1369

INDEX

Personal representative—*contd.*

liability of—*contd.*

- for wrongful appropriation of chattels personal by deceased, 364
- to complete pending contracts, 1405 *n.*
- under covenants, statutory protection of, 1366
- liability on death of
 - last surviving joint promisor passes to, 155
 - one joint promisor does not pass to, 155
- lien of, on partnership property, 1353 *n.*
- mismanagement of estate by, 1420
 - action against, 1421
- money paid by mistake by, 1421
- nature of property passing to, 1353
- new liabilities incurred by, 1368
- of debtor, defences open to, 110
 - performance of contract by, 110
- of deceased creditor may enforce performance, 111
- of deceased employer liable for workmen's compensation, 456
- partner, of, liability of, 209 *n.*, 1367
- partnership property, claim to share of, 1353
- payment of legacies into Court by, 1413
- personal liability to strangers, 1415
- personal order against, no attachment on, 1421
- pledge by, setting aside of, 1406
- power of carrying on deceased's business, 1405
- power of management of property by, 1404
- power of sale, mortgage or pledge, 1406, 1407
- preference by, right of, 1378, 1379
- promise by, personal liability by, 1418
- property passing to, 1352
- real estate of partnership passing to, 1355
- real estate, subject to estate or interest of, 1303
- realization of assets by, 1403
 - extent of liability, 1403
- retainer, right of, 1379
- right of,
 - to sue felon for causing death of deceased, 363
 - to sue on torts committed against deceased person, 362
 - to sue person liable for death of deceased by any wrongful act, or default, 362, 363
- sale by legatee as, purchaser's title, 1408, 1409
- shareholder, of, liability of, 1367
- survival of right of action for slander of goods to, 428
- tort surviving deceased, liability of, 1363
- Trustee Acts applicable to duties of, 1404
- under Fatal Accidents Act, action by, 363
- underlease granted by, 1410
- vesting of property of deceased in, 1349

Personal services,

- contract for, specific performance of, 127
 - impossibility of performance of contract for,
 - by reason of death, 130
 - by reason of illness, 130
 - notice by party disabled, 131 *n.*
 - injunction to restrain breach of contract for, 128 *n.*
- Person of unsound mind. *See* "Lunatic."

INDEX

- Pilot, "workman," under Workmen's Compensation Act, 457
- Piscary. *See* "Fishery, common of."
- Pledge. *See also* "Chattels corporeal, pledge of."
 - of credit of firm, by partner for purpose outside business, 269
 - of goods, when amounting to conversion, 416
 - personal representative, by, setting aside of, 1406
- Pledgee,
 - conversion of goods by, 416 *n.*
 - of goods *bonâ fide*, when guilty of conversion, 419, 420
- Ploughbote. *See* "Estovers."
- Police. *See* "Constable."
- Police force, member of, not "workman" under Workmen's Compensation Act, 458
- Policy of insurance. *See also* "Insurance."
 - life, assignability of, 305 *n.*
 - marine,
 - assignability of, 305 *n.*
 - names to be inserted in, 304 *n.*
 - matrimonial, 307
 - fraud on creditors of insured by, 307
 - trust created by, 307
 - stamp on, 304 *n.*
 - exemption of, in case of friendly societies, 304 *n.*
- Polygamy, effect of, on marriage, 1172
- Poor law, claims by auditors against guardians and officers, barred by period of nine months, 73
- Poor rate,
 - distress for, trespass *ab initio* on, 384 *n.*
 - irregular distress for, 533
- Portion,
 - minor, in case of, 1282
 - satisfaction of, 1283
- Possession,
 - action of ejectment against person withholding, damages for dispossession recoverable in, 388
 - actual, plaintiff must prove in action of trespass to goods, 407, 408
 - bailee obtaining with deceit, intending to misappropriate, guilty of larceny, 409 *n.*
 - bailor of goods has sufficient, to maintain action of trespass against third persons, 409
 - duty of vendor to give or tender, to buyer under contract of sale of land, 188
 - for statutory period, sufficient title to recover in ejectment, 389 *n.*
 - goods lost or stolen while in bailee's, trover for, 420
 - lien of employee dependent on, 223, 224
 - mere wrongdoer divested of, action of trover by, not maintainable, 418
 - of finder sufficient to support trespass by, against person without title, 411
 - of goods,
 - acquired lawfully or unlawfully, immaterial for purposes of trover, 415
 - agreement to give up, may be implied from part delivery, 177
 - carrier or bailee continuing in, on rejection by buyer, transit not ended by, 177
 - obtained by buyer, loss of lien of unpaid seller on, 176
 - right to, action of trover founded on, 414, 414 *n.*
 - taken by unpaid seller, stoppage *in transitu* by, 177, 178
 - of land,
 - by purchaser, duty of vendor to pay outgoings prior to, 189

INDEX

Possession—*contd.*

of land—*contd.*

- by purchaser, to be taken on completion of purchase, 190
- duty of vendor to give on completion, 189
- entry by person entitled to immediate, 383
- extent of, for purposes of trespass, 381
- obtained by forcible entry, 383
- or chattels, assault or battery in defence of, justified, 434, 435, 436
- delivery of, ordered by Court, 379
- recovery of, by co-owner, by action in nature of ejectment, 388, 389
- person deemed to be in, since time of accrual of title, 384
- person in *de facto* exclusive, may bring action for trespass, 381
- unauthorised interference with, by voluntary act, 380

of master,

- goods left in custody of servant remain in, 408
- servant acting inconsistently with, liable for trespass, 408
- of servant, goods handed to servant on behalf of master in, 408
- parting with, no defence to action of detinue, 424, 425
- right to, whether right to bring trespass carried by, 411 n.
- sufficient to support action of ejectment against mere trespasser, 390
- verdict of jury influenced by, disputed by Court, 372
- writ of, 579 n.

Possession of chattels,

- acquisition of, 921
- assault or battery in defence of, 434, 435, 436
- deceased person, of, 924
- definition of, 921
- delivery of, ordered by Court, 379
- finding, by, 923
- landowner has, 921
- liabilities of possessor, 926
- loss of, 923
- personal, direct infringement of, 407
- rights of possessor, 926

Post, acceptance of offer by, 90—91

Pound breach, action for, 534

Power of appointment, rule against perpetuities, and, 1077

Power of attorney,

- death, bankruptcy, or lunacy of donor, liability of person acting after, 241, 242
- definition of, 228 n.
- expressed to be irrevocable,
 - not revoked by act, death, marriage, lunacy or bankruptcy of donor, 242, 243
 - rights of purchaser and donee under, 242, 243
- irrevocable, when, 60, 242, 243
- protection of persons acting on, 1118
- revocation of,
 - by word of mouth, 240 n.
 - payment made after, in ignorance of, 241, 242
 - rights of third parties without notice, 60

Prejudice, verdict of jury influenced by, set aside by Court, 372

Premises,

- defect in, duty of occupier to prevent injury caused by, 332
- depreciation in value of, caused by nuisance, reversioner suing for, 396
- scandalous or riotous, maintenance of, a nuisance, 404

INDEX

Premium

- as consideration in contract of insurance, 303
- not returnable on death of master or apprentice, 218
- paid by partner, when returnable on dissolution of partnership, 286
- recovery of, by creditors of insured, 307
- return of, on bankruptcy of master, 219

Prescription,

- absolute title under Act, 853
- appendant rights cannot be claimed by, 851
- common landlord, not generally against, 854
- corporations by, 6
 - how constitution of, determined, 8
- definition of, 849
- disabilities, effect of, 854
- good generally against Crown, 852
- light, to, peculiarities of statutory, 856
- lost grant, theory of, 850, 851
- nuisance, and right of, 395
- nuisance, public, not justified by right of, 395 *n.*
- perpetual right acquired by, 851
- presumptive title under Act, 853
- statutory,
 - definition, 852
 - effect of leases on, 855

Presumption,

- ademption of portion legacy, of, 1282
- double legacies,
 - against, 1274, 1275
 - in favour of, 1275
- evidence to rebut, 1284, 1285
- legacies confined to legitimate relations, 1274
- legacy to executor, 1285
- of damage caused by negligence, 330
- of death,
 - how rebutted, 4
 - in law, 4
- purchaser of estate, 1299
- satisfaction of
 - debt by legacy, 1281
 - portion, 1283

Price,

- action for, by seller, for goods sold on refusal or neglect of buyer to pay, 180
- breach of warranty set up in reduction of, 181
- contract of sale of land conditional on ascertainment of, 184, 185
- facts affecting need not be disclosed by purchaser of land, 191
- fair, what is, in contract of sale of land, a question of fact, 185
- in contract of sale
 - determined by course of dealing, 162—163
 - may be fixed by contract, 162—163
 - may be fixed in manner agreed, 162—163
 - of goods, 161
 - reasonable, what is, a question of fact, 162—163
 - reasonable, when buyer liable to pay, 162—163
- no payment or tender of, to "unpaid seller," 173
- payment of, and delivery of goods concurrent conditions, 168

INDEX

Price—*contd.*

- reasonable, liability of buyer for, when goods accepted before contract avoided in default of valuation to fix price, 163
- recovery of judgment for, lien of unpaid seller not lost by, 176
- resale of goods by unpaid seller on failure of buyer to tender, within reasonable time, 179
- reserve, sale by auction subject to, 183, 192
- sale of land, provisions as to, in contract of, 184
- to be fixed by valuation of third party in contract of sale of land, 185
- valuation by third party to fix, 163

Principal,

- agent must act with strictest good faith towards and for exclusive benefit of, 231
 - balance due to, duty of agent in regard to, 233
 - bankruptcy of,
 - authority of agent to complete transaction by formal act not revoked by, 239 *n.*
 - contract of agency determined by, 238, 239
 - revocation of agent's authority by, date of, 239
 - transactions protected on, 239
 - commission paid to agent, recovery of, by, 236
 - death of,
 - contract of agency determined by, 238
 - effect of, on authority of agent coupled with interest, 240 *n.*
 - revocation of authority of agent by, 241 *n.*
 - damages recoverable by, for loss due to bribe to agent, 235
 - debts of, paid with moneys borrowed by agent in excess of authority, 317, 318
 - entitled to secret commission or bribe received by agent, 234, 235
 - indemnification of agent by, 237
 - for unlawful acts done at instance of, 237
 - on improper revocation of authority, 241 *n.*
 - on revocation of authority partly executed, 241, 241 *n.*
 - insanity of, effect of, on authority of agent coupled with interest, 240 *n.*
 - money received by agent on wager recoverable by, 312
 - position of, in regard to sub-agent, 231, 231 *n.*
 - profits made by agent
 - belong to, 234, 235
 - in sole employ outside course of employment belong to, 235
 - recovery of commission paid to agent when secret profit made, 232 *n.*
 - repudiation by, of transactions with agent involving secret profit, 232
 - revocation of agent's authority by, 240, 241
 - right of set-off against creditor, surety may claim benefit of, 296
 - rights and liabilities of, as against third parties, 243
 - secrets of, agent may not use against, 234
 - title of, agent may not dispute, 233
- Principal debtor. *See also* "Surety"; "Guarantee."
- bankruptcy of,
 - proof by surety in, 301
 - whether surety discharged, 301
 - creditor giving time to, surety discharged by, 298
 - creditor taking further security from, surety not discharged by, 298
 - default of, liability of surety becomes primary on, 294
 - discharge of liabilities of, by surety, right of subrogation of creditors, remedies on, 296
 - enforcement of claims against, not condition precedent to liability of surety, 294
 - guarantee for, 290

INDEX

Principal debtor—*contd.*

- indemnification of surety by,
 - before default, 295
 - for all liability and loss incurred, 294
- liability of surety cannot be more than that of, 293
- liability of, to pay for costs of action by creditor against surety, 302
- debt of, not accruing due, discharge of, by surety, 295
- notice of default of, not condition precedent to liability of surety, 294
- obligation of, to indemnify surety, 317 *n.*
- primary and continuing liability of, under guarantee, 290
- primary liability of, may be future or contingent, 290
- proceedings against, by surety, 295
- release of, reservation by creditor of rights against surety on, 298, 299 *n.*
- variation of liability of, surety discharged by, 299

Principal mansion house,

- alienation under Settled Land Acts, consent required, 889
- definition, 888

Priorities of assignees according to priority notice of assignment to debtor, 142

Privacy, invasion of, no action for, 501 *n.*

- right of, not recognised by law, 712

Privilege. *See* "Defamation, action of, privilege."

Probate,

- executor must obtain, 1346
- grant of,
 - revocation of, 1350
 - to executor, 1333 *n.*
- injury committed to goods of deceased before grant of, action of trespass for, by personal representative, 410
- renunciation of, by executor, 1334
- revocation of, validity of acts before, 1351

Profits,

- annuity out of, receipt of, by widow and children of deceased partner, partnership not implied from, 264
- ascertainment of, partner not entitled to interest on capital before, 277
- by agent, principal entitled to, 234, 235
- included in land, 18
- lender of capital receiving share of, as interest, partnership not implied from, 265
- made by agent in sole employ outside course of employment belonging to principal, 235
- mesne, claimed since date of accrual of title to land, 384
- of a thing defined, 18
- of business,
 - parties entitled to share equally in, 277
 - sharing of, *primâ facie* evidence of partnership, 264
- of land, liability of joint tenant or tenant in common to account for amount received in excess, 320
- receipt of debt out of, partnership not implied from, 264
- remuneration according to, partnership not implied from, 264
- sharing of, partnership not implied from, 264

Profits *à prendre*,

- definition, 714
- gross, in, 680 *n.*
- interference, substantial, with, a nuisance, 403
- list of, 714, 715
- trespass to land committed in lawful exercise of, justifiable, 386

Prohibited degrees of relationship, effect of, on marriage, 1172

INDEX

- Projection, right of,
 - definition, 714
 - not for overhanging trees, 714
- Promise,
 - abandonment of unfounded claims may be consideration for, 94
 - act antecedent to, 93, 94
 - act subsequent to, 93, 94
 - action on, by joint promisees, 157
 - breach of,
 - giving option to discharge contract, 147
 - giving rise to claim for damages, 147
 - by executors or administrators to answer damages must be in writing, 97, 98
 - consideration for, necessary in simple contract, 92
 - need not be of equal value with, 94
 - contract may contain reciprocal, 92
 - contract to pay penalty for non-performance of impossibility amounts to mere voluntary, 140
 - contrary to course of nature no consideration, 95
 - gratuitous, not specifically enforceable, 127
 - impossible in law no consideration, 95
 - in consideration of marriage must be in writing, 97, 98
 - new, acceptance of, in satisfaction, 151
 - not to be performed within a year must be in writing, 97, 98
 - of act compelled by law, 95
 - of act contrary to law, morality or public policy, 95
 - of payment no accord and satisfaction, 151
 - to answer for debt or default of another must be in writing, 97, 98
 - to transfer interest in land must be in writing, 97, 98
- Promisees, joint. *See* "Joint promisees."
- Promisor, several, 153—155
- Promisors, joint. *See* "Joint promisors."
- Promissory note. *See* "Bill of exchange."
- Property,
 - acquisition of, by child *en ventre sa mère*, 25
 - alien enemy may acquire by unilateral conveyance, 20 *n.*
 - bought with funds of partnership, 275
 - conveyance of, condition in rendered impossible by Act of God, 48
 - diminution in value of,
 - evidence of extent of nuisance, 392
 - not *per se* a nuisance, 392
 - disposal of, by married woman may require concurrence of husband, 29, 30
 - entrusted to person for particular purpose may be recovered before holder parts possession with, 321
 - foreign corporation may acquire in England, 7
 - gift of, with restriction on remarriage, good, 42 *n.*
 - glass spikes placed in defence of, justifiable, 445 *n.*
 - good title to, duty of vendor to make and show, 188
 - married woman may acquire and dispose of, 28—29
 - of convict, vesting of, in administrator appointed by Court, 20, 21, 21 *n.*
 - of married woman liable in respect
 - of contract, 29
 - of tort, 29 *n.*
 - of master, protection of, by servant, 352, 353
 - of principal, agent must keep distinct, 233
 - of unincorporated association liable for wrongful acts of officers or servants, 6, 6 *n.*

INDEX

Property—*contd.*

- partnership application of, 274
- recovery of, when transferred in contemplation of illegality, 43
 - by claimant *in minori delicto*, 43
- savage dog kept in defence of, whether justifiable, 445 *n.*
- transferred in pursuance of immoral object, 41 *n.*
- Prosecution, stifling of, for public offence, 41
- Prospect, right of, not recognised by law, 712
- Protection order, effect of, 1199
- Protector of settlement. *See* "Estate tail."
- Public authorities, actions against, subject to rule of limitation, 345
- Public duty,
 - act or neglect connected with, what constitutes, 74 *n.*
 - breach of, 529—532
 - neglect of, action for, barred by period of six months, 73—74
- Public-house, wages may not be paid at, in, or within, 226
- Public official,
 - purchase or sale of illegal procurement or resignation of, illegal, 41
 - subordinates of, torts of, personal liability for, 340
 - torts of,
 - action against, in representative capacity for, not maintainable, 340
 - committed by or with authority of Crown, liability to be sued for, in private capacity, 340
- Public policy,
 - act or forbearance contrary to, no consideration, 95
 - transactions contrary to,
 - duties imposed by law, evasion of, 41
 - irregular sexual connection, 41
 - marriage,
 - complete or undue restriction on, 41
 - procurement of, in return for reward, 41
 - prospective dissolution of, 41
 - not generally enforceable, 41
 - public offence, stifling of prosecution for, 41
 - public office,
 - procurement or resignation of, 41
 - purchase or sale of, 41
 - trade,
 - deception in matters of, 41
 - unreasonable restraint of, 41
- Public right,
 - denial of, appreciable damage in fact need not be proved in action for, 326
 - infringement of, when action maintainable by individual for, 327, 328
- Public Trustee
 - appointed only by settlor, 1110 *n.*
 - counts as two for resignation, 1109
 - executor, as, 1336
 - judicial trustee, may be, 1111
- Publishing
 - confidential information, damages and injunction for, 427
 - literary or artistic composition without authority, damages and injunction for, 427
 - slander of goods, action for damages and injunction on, 428
- Publishing of photograph, unauthorised, action for damages and injunction on, 427
- Pupil, chastisement of, assault or battery justified if committed by way of, 436
- Pur autre vie*, tenant, has powers of tenant for life, 885

INDEX

- Purchase,
 - deposit on, counting as earnest, 136
 - in name of
 - child, trust not implied from, 1102 *n.*
 - stranger, trust implied from, 1101
- Purchaser,
 - conveyance vesting legal and equitable ownership in, duty of vendor to execute or procure execution of, 188
 - duty of,
 - to pay purchase-money and interest on execution of conveyance by vendor and other parties, 190
 - to enter into proper covenants for performance of future liabilities, 191
 - for valuable consideration protected under Act of 1571.. 1058
 - for value *bonâ fide*, definition of, 756
 - of goods, *bonâ fide*, when guilty of conversion, 419, 420
 - of goods in market overt, liability of, for conversion, 420, 420 *n.*
 - of lease bound to covenant to pay rent and perform the covenants and indemnify vendor against liability, 191 *n.*
 - outgoings payable by, 188
 - solvency of, agent for sale not answerable for, 235
- Purchaser of land. *See also* "Sale of land."
 - equitable interest of, 750
 - in possession, tenant at will, is, 619
 - may require vendor to go back to good root of title, 194
 - occupation by, 643
 - liable for loss resulting from accidental injury to property after date of contract, 191
- Quakers. *See* "Society of Friends."
- Quantum meruit*, 214, 221
 - right to recover under, 321
- Quasi-contract,
 - breach of, consequences of, 316
 - definition of, 315
 - distinguished from contract and tort, 315 *n.*
 - enforcement of obligation arising from, by action of assumpsit under old law, 316 *n.*
 - fulfilment of obligation arising from, by specific performance, 316 *n.*
- Quasi-entail,
 - barring of, 580
 - limitation of, 579
 - powers of tenant in, 581
- Quasi-fee simple,
 - alienation of, 578
 - creation of, 578
 - executory interest in defeasance of, 579
 - succession to, 579
- Quo warranto*. *See* "Franchise."
- Railway,
 - no presumption of *medium filum*, 778
 - what minerals included in sale of land to, 188
- Railway company,
 - conditions limiting liability in respect of carriage of goods must be just and reasonable, 257
 - damages recoverable from, for loss of or injury done to animals in carriage, 257 258
 - increased charge by, for carriage of valuable animal, 258

INDEX

Railway company—*contd.*

- limitation of liability by, in respect of goods carried, 256, 257
- loss of goods due to felony of servant of, 257 *n.*
- must afford reasonable facilities for receiving, forwarding and delivering traffic, 256
- professing to act as common carrier of personal luggage of passengers, extent of liability of, 256
- proof of reasonableness of special contract of carriage by, 257
- rights, privileges and liabilities as common carrier, 258
- sale of goods in transit by, 966
- servant of, a "workman" for purposes of employers' liability, 450
- to what extent a common carrier, 255
- traffic, what is, 256 *n.*

Rape, wife's ground for divorce, 1187

Rate of interest payable on judgments, 117

Ratification,

- agency created by, 53
- of contract by minor not enforceable, 24

Real estate. *See also* "Realty."

- bastard cannot inherit, 1298
- charge of debts upon, effect of, 1393
- charge of legacies upon, 1397
- conversion of, 1356, 1357
- definition of, 1298 *n.*
- descent of,
 - effect of local custom on, 1302
 - estates tail, 1301
 - in case of death before 1834..1304
 - on failure of issue, 1301
 - socage interests, 1300
 - to half-blood, 1302
 - to issue, 1300
 - traced from purchaser, 1298, 1299
- devise of, on trust, not wasting security, 1121
- double title, 1299
- estate *pur autre vie*, 1303
- inheritance of,
 - common law rules, 1297
 - local custom, 1297
- legatees cannot claim on, 1374, 1397, 1398
- liability for mortgage or equitable lien on, 1396
- option to purchase, effect on, 1360
- payment of debts out of, 1392, 1393
- personal representative, rights of, 1303
- presumption of purchase, 1299
- sale of,
 - by executor for payment of debts, 1409
 - under Partition Act, 1868..1360
- socage interests, rules of, 1297
- specialty creditors, claims of, 1371

Real Property Limitation Acts. *See* "Adverse possession."

Realty. *See also* "Land," "Real Estate."

- acquired by undischarged bankrupt passes to trustees, 28
- chattels included in, 15
- claims of Crown to, when barred by lapse of time, 79
- claims to recover, barred by period of twelve years, 73

INDEX

Realty—*contd.*

- dignities included in, 15
- franchises included in, 15
- gift of, accompanied by restriction against marriage good, 42 *n.*
- interests in land included in copyhold tenure, frankalmoigne, or socage, 15
- leaseholds considered as, 15 *n.*
- of deceased, torts to, right of personal representatives to sue on, 362
- offices included in, 15
- peerages included in, 15
- public rights treated as property are, 15
- restraint on alienation of, absolute, attached to transfer or creation of fee simple or fee tail, 43
- shares in companies owning interests in lands considered as, 15, 15 *n.*
- what is, 15

Reasonable and probable cause. *See* "Malicious prosecution, action of."

Reasonable time for forbearance to assert a claim question of fact, 95

Receipt

- by carrier for increased charge in respect of carriage of valuable goods, 254
- request of, not a condition, 109
- stamped, liability of person refusing to give, 109 *n.*
- tender conditional on giving of, 109

Receipts of trustee vendors, 190 *n.*

Receiver. *See also* "Land, mortgage of."

- appointment of, by way of equitable execution, 1056, 1057
- effect of, 1057 *n.*
- debenture-holders, appointment by, 1010
- of interest of partner in partnership property, 276
- tithe rent-charge recovered by appointment of, 80 *n.*

Receiving order,

- ascertainment of damages by judgment before date of, 367
- effect of, on creditor's right to sue, 149

Recognition,

- Crown, no statutory bar to, 986
- definition, 986 *n.*

"Reconversion," term discussed, 1361 *n.*

Redelivery of goods to seller after notice of stoppage *in transitu*, 178

Redemption by other partners of interest of partner subject to charge, 276

Re-entry

- as remedy of person injured by tort, 369
- breach of condition for, 794

Registered disposition of land, necessary, when, 809

Registered land, conveyance by unregistered deed, effect of, 809

Registrar of marriages,

- celebration of marriage by, 1157
- certificate by, 1159—1161
- prohibition of issue of, 1164
- licence by, 1159, 1161
- misdescription in, 1171
- prohibition of issue of, 1164

Reimbursement, agent entitled to, on revocation of authority partly executed, 241

Release

- by one joint promisee, liability of promisor to others discharged by, 158
- unless fraudulent, 158
- covenant not to sue, does not amount to, 336 *n.*
- discharge of rights of action by, 150
- of joint promisors, liability of others discharged by, 155

INDEX

- Release**—*contd.*
 of joint and several promisors, liability of others discharged by, 155
 of one co-tort-feasor, action against others barred by, 336
 under seal,
 right of action in tort may be discharged by, 368
 without consideration, 368
- Reliefs,**
 distress for, 551
 liability for, 550
- Religion,**
 choice of, for minor, 1227—1228
 discretion of Court in, 1228—1229
- Remainder.** *See also* "Future interests in land."
 abeyance of seisin, must not contemplate, 654 *n.*
 alternative in fee permissible, 655
 at will, 654 *n.*
 class gifts in, 658 *n.*
 corporation, future, cannot take in, 662
 creation of, 653
 definition of, 653
 disseisin, must not contemplate, 654
 freehold particular estate, must be, 654 *n.*
 presumption of, 657
 so-called leasehold, 654 *n.*
 unborn person, heirs of, to, 662
 vested and contingent, 653
- Remainder, contingent,**
 copyholds in, 653 *n.*
 executory interest, as, 657 *n.*
 vests on happening of contingency, 653
- Remainderman,**
 action by,
 against stranger in respect of damage to inheritance, 405
 against tenant of land in respect of land, 405
 action of nuisance by, when maintainable, 396 *n.*
- Remedy, election of, 139**
- Remuneration**
 of agent, 236
 of servant or agent according to profit, partnership not implied from, 264
- Rent, apportionment of, 622**
 arrears recoverable by distress or action limited to six years, 80
 distress for, trespass *ab initio* on, 384 *n.*
 entry on land by landlord for purpose of demanding, justifiable trespass, 385
 goods distrained for, action of trover by owner against third party on, 414 *n.*
 joint tenant or tenant in common receiving excess of, must account for,
 320
 purchaser of lease is bound to covenant to pay, 191 *n.*
 title to, extinguished on expiry of period of limitation of action, 80
- Rent-charge,**
 apportionment of, 740
 arrears of, recovery of, 83
 barred after twelve years, 843
 definition of, 737
 distress for, 738
 equitable power to raise, 739
 extinction of, 740

INDEX

- Rent-charge—*confd.*
 - not more than six years recoverable, 843
 - owner cannot prevent waste, 740
 - redemption of, 741
 - statutory remedies for recovery of, 83, 738
 - terre-tenant liable for, 737
- Rent service,
 - distress for, 550
 - incorporeal hereditament, none in, 672 *n.*
 - liability for, 549
- Replevin,
 - action of, for wrongful
 - distress, 413 *n.*
 - seizure of goods, 413
 - action of trespass barred by bringing of, 413
 - as remedy of person injured by tort, 369
 - triable in court baron, 691 *n.*
- Representation as to credit of another person, when action in regard to maintainable, 350 *n.*
- Representative. *See* "Co-representative," "Personal representative."
- "Representatives," definition of, in relation to succession, 1308 *n.*
- Representatives of deceased co-surety, contribution by, to surety discharging more than proportion of principal debtor's liability, 296
 - personal, of co-promisee, rights in respect of joint loan, 157
- Request, performance may be conditional on antecedent, 115
- Resale of goods
 - by unpaid seller, 174, 179
 - notice to buyer of, 179
 - title of buyer on, 179
 - in exercise of right reserved by seller, rescission of contract by, 179, 180
- Rescous, action for, 534
- Reserve capital, definition, 1008
- Res nullius*, acquisition of property in, 936
- Restitution as remedy of person injured by tort, 369
- Restitution of conjugal rights,
 - decree for, 1179
 - decree of, desertion by non-compliance with, 1188
 - domicile in relation to, 1204
 - maintenance order under decree for, 1200, 1201
 - payments on disobedience to decree, 1180
 - separation deed not necessarily a bar to, 1179
 - settlement of property and, 1180
- Restraint on alienation,
 - absolute prohibition attaching to
 - transfer or creation of fee simple or fee tail, 43
 - personal property, 43
 - qualified restriction valid if not transgressing rule against perpetuities, 44
- Restraint on anticipation,
 - effect of termination of marriage and re-marriage, 45
 - married woman may be subject to, 29
 - may be set aside with consent of married woman, 45
 - rule against perpetuities, and, 1078
- Retainer,
 - co-representative's right of, 1382
 - exercise of, circumstances affecting, 1380, 1381
 - legal and equitable assets, in, 1381

INDEX

- Retainer—*conid.*
personal representative, after death of, 1382
representative of minor or lunatic, by, 1382 *n.*
right of,
 by heir, 1380 *n.*
 by personal representative, 1379
statute-barred debts of, 1383
waiver of right of, 1382, 1383
- Returns, sharing of gross, partnership not implied from, 263
- Reversion. *See also* "Future interests in land."
alienation of, 651
attornment of tenant, 651, 652 *n.*
creation of, 649
incidents of, 550, 551, 552, 650
incorporeal hereditament, when, 649
nature of, 648 *n.*
particular estate and, 649
severance of, 621, 622
- Reversionary lease distinguished from lease of reversion, 613
- Reversioner,
 action by,
 against stranger in respect of damage to inheritance, 405
 against tenant of land in respect of waste, 405
 for permanent injury to reversionary interest, 426
 action of nuisance by, when maintainable, 395, 396
 declaration of title of, 651
 entry by, on land, to detect waste, justifiable trespass, 385
 rights of, 650
- Reverter, possibility of, 652
- Revocation,
 of authority of agent,
 acted upon, 240, 241
 by bankruptcy, 238, 239
 date of, 239
 by death, 238
 by principal, 240
 damages for, 240
 coupled with interest, 240
 form of, 240 *n.*
 partially executed, 241
 of continuing guarantee by notice to creditor, 293
 of power of attorney,
 by word of mouth, 240 *n.*
 expressed to be irrevocable, 242, 243
 payments made after, in cognizance of, 241, 242
- Revocation of will or codicil,
 alterations, by, 1248
 appointments revoked by, 1249
 dependent relative revocation, 1249
 destruction, by, 1248
 formal, 1247
 joint wills, 1246
 law governing, 1245
 lost, 1252
 marriage, by, 1246
 power of, 1245

INDEX

- Right,
 - constitutional, plaintiff deprived of, exemplary damages for, 370
 - local, substantial interference with, a nuisance, 403
 - proprietary, intentional violation of, by illegal act, liability for, 428, 429
 - protection of, degree of force employed in, 436
- Riparian proprietor, water flowing past land of, right to user of, 403 *n.*
- Risk
 - of deterioration in goods incident to transit on buyer, 171—172
 - of party defaulting, when delivery of goods delayed, 167
 - of seller,
 - goods delivered at, 171
 - where delivery of goods involves sea transit, 171
 - passing to buyer, goods perishing before, agreement avoided by, 162
 - seller's, goods remain at, till property is transferred to buyer, 167
- Royal fish (franchise), nature of, 702
- Salary. *See also* "Wages."
 - ranking of, in bankruptcy, 226, 227
 - what is, 227 *n.*
- Sale
 - by co-owner, 418
 - Court, may be ordered by, in mortgage action, 827
 - deposit on, 136
 - personal representative, by, setting aside of, 1406
 - statutory power of, by tenant for life, 878
- Sale of goods. *See also* "Market overt."
 - contract for,
 - avoided, if specific goods perish before risk passing to buyer, 162
 - by description, 165
 - implied condition that goods correspond with description, 165
 - by instalments, 170
 - by sample, 166, 167
 - conditional, 163
 - consideration, 161
 - defined, 161
 - delivery under, where no time fixed in, 168
 - duty of buyer to accept delivery in accordance with, 167
 - duty of seller to deliver in accordance with, 167
 - goods forming subject of,
 - may be existing, 162
 - may be future, 162
 - implications from, how negated, 182
 - implied condition in, as to title of seller, 164
 - implied warranty,
 - free from incumbrances, 165
 - of peaceful possession, 165
 - insolvency of buyer, effect of, 174, 175, 176
 - meaning of "goods," 99, 100
 - "month" in, means calendar month, 69
 - mortgage, pledge, charge, or security not included in, 183
 - not rescinded by unpaid seller exercising right of lien or stoppage *in transitu*, 179
 - of value of £10 or upwards, 99, 162
 - on valuation by third party, avoided in default, 163
 - part owner, by, 161
 - price in,
 - determined by course of dealing, 162—163

INDEX

Sale of goods—*contd.*

contract for—*contd.*

price in—*contd.*

may be ascertained in manner agreed, 162—163

may be fixed, 162—163

reasonable, when buyer liable to pay, 162—163

repudiation of,

by failure of buyer to accept delivery, 173

on breach of condition, 163

on defective delivery, 170

rescinded by resale in exercise of right reserved, 179

separate in respect of each lot at auction, 182

stipulation in, whether condition or warranty, 163, 164

valuation by third party, 163

void if specific goods perish at date of, 162

waiver of condition in, 163

warranty in, as to fitness or quality, when implied, 165—166

damages recoverable on resale on breach of contract for, 179

delivery in pursuance of contract for, when no place appointed, 112, 112 *n.*

part owners may contract for, 161

price of, action for, 180

may be reduced, 181

resale, 179

risk of buyer, before property transferred by seller, 167

risk of seller, before property transferred to buyer, 167

"seller" of, who is, 174

"unpaid seller," rights of, 174, 175

who is, 173

Sale of land. *See also* "Vendor," "Purchaser."

by auction,

particulars or conditions of sale, what must be stated in, 191

reservation of right to bid, 192

subject to reserve price, 192

without reserve, 192

contract of, 557

avoided by failure of third party to make valuation when price conditional on, 185

between part owners, 184

conditional on ascertainment of price, 184, 185

creation of interest in, 192

does not include agreement to create mortgage, 193

duties of purchaser under, 189, 190, 191

duty of vendor

to comply with all proper requisitions on title made by purchaser, 193

to deliver abstract of title to purchaser, 193

to disclose facts beyond title, doubtful, 39 *n.*

to enter into proper covenants for title and other usual covenants, 189

to execute or procure execution of proper conveyance under, 188

to give or tender possession to purchaser, 188

to hand over the deeds to purchaser on completion, 188, 189

to make and show good title under, 188, 193

to take reasonable care of property and pay outgoings until purchaser takes possession, 189

implied condition and warranty as to good title in, 185, 186

implied undertaking by vendor

for right of access, 187

INDEX

- Sale of land—*contd.*
 contract of—*contd.*
 implied undertaking by vendor—*contd.*
 to convey free from incumbrances, 186
 to convey freehold estate of fee simple, 186
 to convey whole interest in land, 186
 to disclose defects in title, 186
 implied undertakings by vendor do not arise when circumstances negativ-
 ing known to purchaser, 187
 implied undertaking, rights of ownership *usque ad cælum et ad inferos*,
 189
 interest on lien for return of deposit under, 119
 interest on lien of unpaid vendor, 119
 interest on purchase-money under, 119
 must not contain terms contrary to law, 185
 "open," 185
 price in,
 provisions as to, 184
 to be fixed by valuation of third party, 185
 valuation of third party to determine, prevented by party to contract,
 185 *n.*
 what is fair a question of fact, 185
 purchaser under, need not disclose facts which might affect price,
 191
 requirements of, 184
 rights of purchaser under, as to commencement of title, 193, 194
 to railway company under the Railways Clauses Consolidation Act, 1845,
 minerals not included in, 187, 188
 to undertakers under Waterworks Clauses Consolidation Act, 1847,
 minerals not included in, 187, 188
 what is, 184
 when enforceable, 184
 under execution, 863 *n.*
 under Partition Act, 1868.. 1360
 Salvage, indemnity for, 324, 325
 Sample,
 sale by, 165, 166, 167
 description and, 165, 166, 167
 Satisfaction. *See* "Accord and satisfaction."
 Satisfaction (equitable doctrine). *See also* "Legacy," "Ademption."
 debts, of, by legacies, 1281
 legacies, of, by advances, 1284, 1285
 portions, of, by advances, 1283
 Satisfied term,
 cesser of, 637
 definition of, 637, 638 *n.*
 Schoolmaster, chastisement by, extent and nature of authority as to, 437 *n.*
Sci. fa. *See* "Franchise."
 Scierter, proof of, to make person keeping dog liable for damage committed by
 it, 359, 360
 Scotland, judgments of superior Courts of, effect of registration of, 323 *n.*
 Scrip, nature of, 1014
 Sea, carriage by. *See* "Carriage."
 Sea-fishing service,
 apprentice in, "workman" under Workmen's Compensation Act, 457
 apprentice to, 220

INDEX

- Seal,
 - agreement in discharge of contract after performance by one party must be under, 145
 - corporations enter into contracts or execute conveyances through common, 10
 - promise to lend goods must be under, 198
 - specialty contract requires, 96
 - want of, when requisite, effect of, 96
- Seaman,
 - industrial diseases in Workmen's Compensation Act not applicable to, 458 *n.*
 - "workman" under Workmen's Compensation Act, 457
- Sea service,
 - apprentice to, 220
 - "workman" under Workmen's Compensation Act, 457
- Search warrant, malicious prosecution, will not found action of, 491
- Secretary of State, by-law approved by, under Act of Parliament, not defective for purposes of employers' liability, 448 *n.*
- Secret profit
 - by agent, 232
 - recovery of, by principal, 232 *n.*
- Securities
 - deposited as cover by party to wager, recovery of, 310, 311
 - for gambling debts, 313
 - for money, *fi. fa.*, may be seized under, 1055
- Seduction
 - defined, 464
 - vindictive damages for, 370
- Seduction, action for,
 - bankruptcy, not affected by, 468
 - by whom maintainable, 464
 - character of woman debauched, 469
 - collusion by plaintiff, 467
 - damages in, 468, 469
 - debauching, proof of, during service, essential element in, 465
 - development of, 464 *n.*
 - only by employer, 465
 - pregnancy or illness, proof of, during service essential element in, 465
 - service, what is, 467
 - when presumed, 466
 - trustee in bankruptcy, does not pass to, 467
 - where service colourable, 466
- Seignory,
 - definition of, 650
 - escheat and, 650
- Seisin, abeyance of,
 - contemplated, makes remainder void, 654 *n.*
 - fatal at common law, 663 *n.*
 - incorporeal hereditaments, none in, 672 *n.*, 673 *n.*
 - statute, now possible under, 663
- Seizure, unlawful, of chattels, assault or battery to prevent justified, 435
- Self-defence,
 - amount of force employed in justifiable, 82
 - assault or battery justified on ground of, when, 434
- Separation, agreement for, before marriage, 1180
- Separation order,
 - effect of, 1198

INDEX

Separation order—*conid.*

grounds for, 1197, 1198
 payments by husband to wife under, 1198

Sequestration, writ of, may be registered, 864

Servant. *See also* "Master," "Service,"

acting inconsistently with possession of master, liability of, for trespass to goods, 408

authority to pledge credit of master when presiding over household, 57

betrayal of confidence by, 210

common employment, doctrine of, 58, 58 *n.*

conduct of, within course of employment,

question of fact, when, 353

rules for determination of, 352

control exercised by master over work done by,

evidence of, 351

question of fact, 351

damages for betrayal of confidence by, 210

death of, contract of service determined by, 214

deduction from wages of, for sickness or incapacity, 213

discretion given to, wrongfully exercised, liability of master for, 352

dismissal of,

for prolonged incapacity through sickness or other cause, 213

without notice or wages, when justified, 212, 213

domestic or menial, determination of engagement of, 211, 212

duties of, 211

earnings of, right of master to, 209

as against third parties, 209

engaged for skilled labour, liability of, 209—210

food of, whether master liable to provide, 208 *n.*

goods handed to, on behalf of master by third person, in whose possession, 408

goods of master left in custody of, remain in possession of master, 408

in husbandry considered as "workman," 225, 449, 450

injunction to restrain betrayal of confidence by, 210

may be general or particular, 352

medicine or medical attendance for, master cannot charge for, 213

"menial," who is, 212 *n.*

misconduct of, justifying dismissal, what is, a question of fact, 213 *n.*

no right to medical attendance or medicine unless agreed upon, 208.

not entitled to compensation for loss of board, 212 *n.*

of contractor, employer and independent contractor liable for wrongful acts of, 355 *n.*

of corporation, torts of, committed in course of employment, liability of corporation for, 346

of gratuitous carrier not exercising reasonable care, liability for, 259

of railway or canal company, goods lost through felony of, 257 *n.*

payment for services rendered by, up to determination of contract by death of master, 214 *n.*

performance of contract by, 110

protection of master's property within course of employment of, 352, 353

railway, a "workman" for purposes of employers' liability, 450

reasonable reward for services of, when no wages agreed upon, 208

remuneration of, according to profits, partnership not implied from, 264

representatives of, entitled to payment on death of master, 214 *n.*

retainer of, 208

right of, to wages, 208

INDEX

Servant—*contd.*

- right to be indemnified by master, 210
- soliciting customers of former master, when liable for, 210 *n.*
- testimonial to character of, need not be given by master, 209
- tortious conduct of, forbidden by master, no defence to action against master, 350, 351
- tort of, breaking connection with master, 353
 - committed in course of employment, liability of master for, 58, 350, 351
- unincorporated association liable for wrongful acts of its, 6
- unlawful act by, in *bonâ fide* mistaken belief of authority of master, 352
- who is, for purpose of ascertaining liability of master in tort, 351
- wrongful dismissal of,
 - right to damages for, 214
 - right to recover on *quantum meruit*, 214
- wrongfully quitting service without notice, 213

Service. *See also* "Master," "Servant."

- contract of,
 - and Workmen's Compensation Act, 457
 - defined, 207
 - determined by death of either party, 214
 - duration, 211
 - agreement to pay periodical wages not conclusive as to, 211
 - not determined by bankruptcy of master, 215
 - not presumed from domestic relationship, 207
 - from fact of service, 207
 - when required to be in writing, 207—208
- duty of servant to enter into, and continue in for time agreed, 209
- gratuitous,
 - determinable without notice, 215
 - governed by law affecting contract of, 215
 - promise of, not under seal, cannot be enforced, 215
- seduction of woman in defendant's, 465

Services, action for deprivation of,

- apprentice, may be applied to, 475
- child, may be applied to, 475 *n.*
- death, not for, except by statute, 477
- essential features, 474
- "harbouring," 474
- history of, 475 *n.*
- not necessary to prove knowledge, 474
- physical injury, by, 476
- trade dispute, not in, 478

Set-off

- by surety against creditor, 296
- not to be deducted from tender, 109

Settled land, definition of, for purposes of Acts, 831

Settled Land Acts,

- capital moneys
 - arising under, 893
 - employment of, 893, 894, 895
- improvements,
 - list of, 896
 - payment for, 894
 - scheme of, 895
- incumbrances, discharge of, 893

INDEX

- Settled Land Acts—*conid.*
 investments of capital moneys, 893
 statutory powers under,
 are fiduciary, 887
 cannot be excluded, 886
 inalienable, 886
 may not be delegated, 887
 when consent required, 888, 889
 trustees for purposes of, who are, 891, 892
 university, powers under, 911
- Settlement,
 compound, definition of, 882
 definition of, for purposes of Settled Land Acts, 881
 executory, when void in bankruptcy, 1069, 1070 *n.*
 fraudulent. *See* "Alienation."
inter vivos, "failure of purposes," ambiguity of expression, 1359 *n.*
 marriage
 by minors with approval of Court, 23, 24
 enforcement by children of covenants in, 104, 104 *n.*
 pre-nuptial, a bar to dower, 1322
 "protector of"
 defined, 30 *n.*
 who may be, 30, 30 *n.*
 variations of, after divorce, 1202
 void, and sub-purchasers, in bankruptcy, 1070
 voluntary,
 for purposes of Bankruptcy Act, 1068, 1069
 void in bankruptcy, 1067
 voidable in bankruptcy, 1067
 wife's property after divorce, of, 1202
- Several pasture, nature of, 716
 Several promisors. *See* "Co-promisors."
- Severance of reversion. *See also* "Incorporeal hereditaments."
 effect of, on conditions, 796
- Share (in company),
 certificate of, 1004 *n.*
 deferred, definition, 1002
 deferred, must be dated in prospectus, 1002
 definition, 1000
 forfeiture of, for non-payment of calls, 1006
 fully paid, what, 1000
 lien for calls, 1006
 personal estate, is, 1000
 preferred, definition, 1002
 registered, must be, 1000
 title to, evidenced by register, 1004
 transferable, not, after call made, 1005
 transfer, blank, effect of, 1005
 transfer of, when void in liquidation, 1071
- Share warrant, bearer, may be issued to, 1002 *n.*
- Shelley's Case*, rule in,
 copyholds, applicable to, 659
 equitable interests in land, applies to, 751 *n.*
 incorporeal hereditaments, and, 672 *n.*
 interests of different nature, 659
 intervening interests, 659 *n.*

INDEX

Shelley's Case—contd.

leaseholds, no application to, 659

stated, 658, 659

test of application, 659, 660 *n.*

Sheriff, trespass to goods seized by, action for, maintainable, 410

Ship,

alien cannot acquire or hold share in British, 30, 974

bills of sale of, 942

British subject reacquiring nationality cannot hold shares in British, 30

damage caused to, by collision at sea, rule applicable as to, 334 *n.*

denizen, conditions for holding shares in British, 30

injuries caused by defect in, liability of inviter as to, 332 *n.*

master of, whether carrier or agent, 177

naturalised foreigner cannot hold shares in British, 30

owner of, carrying goods, liable as common carrier, 260—261

supplier of, liability of, as inviter, 355

Shipmaster "general agent" for employers, 55

Signature

not essential in specialty contracts, 96 *n.*

printed name may be sufficient, 101

sufficiency of, where several documents constitute contract, 101

Signs, intention declared by, 32

Simony. *See also* "Advowson."

effect of, 865

Sister,

half-, of deceased workman "dependant" for purposes of compensation, 462

of deceased workman "dependant" for purposes of compensation, 462

Skill,

absence of, amounting to negligence, 329

contract involving personal, cannot be performed by servant or agent, 110

degree of, required of defendant in general, 331

exercise of,

and care, rules applicable for, 331, 332, 333

by agent, 230, 230 *n.*

by carrier of passengers, 258, 259

by gratuitous agent, 230 *n.*

by person professing special, 331

in performance of particular work, liability of employer, 354, 355

personal negligence of employer in associating employee with persons of less than ordinary, 449

Slander. *See also* "Defamation, action for."

actionable *per se*, 503—504

appreciable damage in fact need not be proved in action for, 326

claim for, barred by period of two years, 73

definition of, 500

of chattels personal, or title to, liability of person publishing to action for damages and injunction, 428

of title,

proof of malice in action for, effect of, 335

to property in land, action in respect of, 406

of women, imputation of unchastity, 504

words written or spoken in course of judicial proceeding, 342

Smoke, right of passage for, 707 *n.*

Socage,

interest in land held by, included in realty, 15

reversion of, to heir of donor on dissolution of corporation, 13

INDEX

- Society of Friends, marriage rites of, 1155, 1158
- Sodomy,
 - judicial separation granted for, 1193
 - wife's ground for divorce, 1187
- Soil,
 - abstracting silt from, right to take percolating water does not cover, 403 *n.*
 - buildings affixed to, included in land, 17
 - trees and other vegetation actually growing in, included in land, 17
- Solicitors,
 - lien of, 961
 - sale to, of subject-matter of litigation unenforceable, 41
- Special agent. *See* "Agent."
- Special licence, marriage by, 1158
- Specialty contract. *See* "Contract."
- Specific performance,
 - absence of writing, when no defence to action for, 98—99
 - breach of contract, when decreed on, 125
 - decreed though penalty or liquidated damages provided for, 139
 - discretion of Court as to, 126
 - gratuitous promise not enforceable by, 127
 - contracts determinable by will not enforceable by, 127
 - infant cannot obtain decree for contract entered into by him, 128
 - movables, of contracts relating to, not decreed, 125
 - not decreed of contract to lend or borrow money, 201
 - of contract for personal service, 127
 - of sale of land where incidents of ownership absent, 187 *n.*
 - to build, when decreed, 127 *n.*
 - to create or transfer interests in land, 125
 - to deliver specific or ascertained goods, 125
 - of marriage articles, 125
 - of specialty contract without consideration not decreed on breach, 96
 - of transaction entered into by mistake not decreed, 37, 38
 - quasi-contractual obligation, whether enforceable by, 316 *n.*
 - refused, when, 126, 127
- Spes successionis*, assignment of, 941
- Sporting, rights of,
 - carry right to protect, 723
 - list, 722
 - overloading with game, 723
 - powers of servient owner, 723
- Staging, injury caused by defect in, liability of inviter as to, 332 *n.*
- Stake, recovery of,
 - from other party, 310
 - from stakeholder, 310, 320
- Stakeholder,
 - money deposited with, 310
 - money or goods deposited with, to abide event of transaction, recovery of, 320, 321
 - payment by, to winner of wager, 310
- Stamps
 - on policies of insurance, 304 *n.*
 - exemption of, in case of friendly societies, 304 *n.*
 - receipt for £2 or upwards must contain a due, 109 *n.*
- Star Chamber influence on action for defamation, 501—503 *n.*
- State, foreign, action of tort in respect of act authorised or ratified by British Government not maintainable by, in England, 340

INDEX

- Statute,
 - absolute duty imposed on employer by, not discharged by employment of independent contractor, 354
 - act or omission under, as justification for nuisance, 393
 - claims under, barred by period of six months, 73—74
 - duties under. *See* "Statutory duties."
 - money payable by, enforcement of obligation as to, by action, 323, 324
 - moneys given under, action for, barred by period of two years, 73
- Statute of Frauds, administration of estates and, 1383
- Statutes of limitation,
 - administration of estates and, 1383 *n.*, 1386
 - devisee in trust cannot prevent running of, 1385
 - enlarged when debts charged on realty, 1386
 - plea of, by one of co-representatives, effect of, 1383
 - time from which period runs, 1386
- Statutory duty, breach of,
 - liability for physical harm caused in, 445
 - mandamus for, 328 *n.*
 - when action maintainable by individual for, 328
- Stock,
 - certificate of, 1004 *n.*
 - differences between, and shares, 1003
 - shares may be converted into, 1003
 - title to, evidenced by register, 1004
 - transfer, blank, effect of, 1005
- Stockbrokers, lien of, 961
- Stock Exchange, wagering transactions on, 313
- Stock warrant, bearer, may be issued to, 1004
- Stolen goods, restitution of, 946
- Stop order, nature of, 1056 *n.*
- Stoppage of goods *in transitu*
 - by unpaid seller, 174
 - after dealings by buyer, 178
 - after part delivery, 177
 - contract not rescinded by, 179
 - giving notice of claim to carrier or bailee, 177, 178
 - notice of, 177, 178
 - redelivery after, according to directions, 177, 178
 - right, how exercised, 177
 - taking actual possession, 177, 178
 - resale of goods after exercise of right of, 179
 - unpaid seller's right not affected by sale or other disposition of goods by buyer, 178
- Stranger may take under indenture, 812
- Stray (franchise),
 - definition, 698
 - rights of, 698, 699
- Sub-agent,
 - agent generally liable for acts of, 231
 - principal generally not liable for acts of, 231, 231 *n.*
- Sub-contractor, when compensation to workmen for injury payable by, 460, 461
- Sub-mortgage. *See* "Land, mortgage of, transfer, effect of."
- Sub-purchaser entitled to plead vendor's title, 757
- Subrogation,
 - doctrine of, 23 *n.*
 - of creditor's remedies, right of surety to, 296

INDEX

- Subrogation—*contd.*
of insurer to remedies of insured, 306, 307
of lenders of money to minors, 23, 23 *n.*
- Subsoil,
interference with possession of, action of trespass for, 381
presumed to be vested in occupier of surface, 777
- Succession.— See “Intestate succession,” “Personal estate,” “Real estate.”
- Sufferance, tenant at,
alienation by, 763
definition, 762
distress by, 763 *n.*
profits, no right to, 762
rent not claimable from, 763
tenant at will, becomes, on acceptance of rent, 763
trespass, may bring, 762
trespasser, not a, 762
use and occupation, liable for, 763
waste by, 764
- Suicide, assault or battery to prevent commission of, justifiable, 437
- Sundays, when excluded from computation of time, 68
- Superintendent registrar of marriages. See “Registrar of marriages.”
- Support, right of,
chattels, may extend to, 713
easement, may be, 713
natural right of property, 713
- Surety. See also “Principal debtor,” “Guarantee.”
action against, by creditor, 302
action by, against principal debtor, parties to, 295 *n.*
continuing guarantee revoked by, on notice to creditor, 293
contribution due to,
by co-sureties, can only be in respect of money paid, 297
released co-surety, 301 *n.*
co-sureties, when, 296
- death of,
effect of, on continuing guarantee, 300
on liability of co-surety, 300
notice to creditor of, 300
- debt discharged by, before accruing due, effect of, 295
- discharge of,
by abandonment of security by creditor, 300
by creditor giving principal debtor time, 298
by extinction of debt, 298
by prejudicial act or omission of creditor, 299
by release of co-sureties, when, 301
by variation of liability of principal debtor or co-surety, 299
not by bankruptcy of principal debtor, 301
creditor merely taking additional security from debtor, 298
forbearance of creditor to sue, 298
- disclosure by creditor to, 293
- enforcement of claim by creditor not condition precedent of liability of, 294
- entitled *pro rata* to security held by co-surety, 297, 298
- entitled to full information, 292
- indemnity by, on subrogation of creditor's rights to, 296
- indemnification of,
by principal debtor before default, 295
by principal debtor for all liability and loss incurred, 294

INDEX

Surety—*contd.*

- interest on money paid by, 118
 - liability of,
 - becomes primary on default of debtor, 294
 - cannot be more than that of principal debtor, 293
 - extent of, determined by contract of guarantee, 293
 - how affected by change in firm, 300
 - limited guarantee by, construction of, 293, 294
 - misrepresentation to, or concealment from, of material facts, 292
 - notice to, of default of principal debtor not condition precedent of liability, 294
 - payment by, on account of principal debt, 295 *n.*
 - payment to, cannot be insisted upon when creditor's claim not satisfied by, 295 *n.*
 - personal discharge of, property given as security discharged by, 300 *n.*
 - proceedings by, against co-surety, 297
 - against principal debtor, 295
 - in name of creditor, 296
 - proof by, in bankruptcy of principal debtor or co-surety, 301
 - remedies of, 295
 - reservation by creditor of rights against,
 - effect of, 298, 299
 - on release of principal debtor, 298, 299 *n.*
 - right of,
 - set-off against creditor, 296
 - to subrogation of creditor's remedies, 296
 - under guarantee, 290
- Surrender, statutory power to accept, by tenant for life, 879
- Swans, cygnets, ownership of, 937

Tacking. *See* "Land, mortgage of," "Priorities."

Tacking, doctrine of, applicable to chattels, 959

Tenancy, effect of, on period of limitation, 78

Tenancy "from year to year." *See* "Yearly tenancy."

Tenancy, joint. *See* "Joint tenancy."

Tenant,

- bankrupt, limitation of distraint on, 81
- giving notice to quit, for nuisance, reversioner suing, 395, 396
- reversioner or remainderman may bring action against in respect of waste. 405

Tenant after possibility. *See also* "Estate tail."

- has powers of tenant for life, 885

Tenant at will,

- period of limitation of action against, 78
- trespass to land in occupation of, suit by, in respect of, 382

Tenant by curtesy, rights and liabilities of, 1314

Tenant for life,

- assignment of estate of, 883
- dealings with, under Settled Land Acts, 889
- definition of, for Settled Land Acts, 883
- notices by, 891
- persons having powers of, 884—886
- statutory powers of, 878—896

Tenant for years. *See also* "Estate for years."

- determinable on life, has powers of tenant for life, 885
- period for limitation of action against, where no lease, 78

INDEX

- Tenant in common, excess of rents or profits received by, liability to account for, 320
- Tenant in fee simple, has powers of tenant for life, when, 885
- Tenant in tail (male, etc.). *See also* "Estate tail."
 has powers of tenant for life, 885
 leases by, under Fines and Recoveries Act, 897
- Tender,
 conditional on creditor giving receipt, not a good, 109
 defence to action for non-payment, when, 107
 equivalent to performance in discharge of contract, 144
 interest does not accrue after, 108
 interest upon debt must be included in, 108
 less amount of set-off, 109
 manner of, 106
 of Bank of England notes, 107—108 *n.*
 of cheque on banker, 108 *n.*
 of country bank-notes, 108 *n.*
 of current coin of United Kingdom, 107—108 *n.*
 of delivery of goods must be made at reasonable hour, 113, 169
 of more than amount due, effect of, 108
 of payment, 106—109
 must be in medium authorized by law, 107
 of money debt in performance of contract, 106
 production of money on, 107
 of performance,
 must be complete, 106
 must be unconditional, 106
 of contract, effect of failure to accept, 106
 refusal of, on specified ground, 108—109
 time of, 106
 fixed, 112
 without payments of money debt no discharge, 107
- Terre-tenant, who is, 738
- Testament. *See* "Will."
- Testamentary disposition, Act of 1571 not within, 1058
- Testimonial to character need not be given by master to servant, 209
- Thing,
 definition of, 15
 requiring special care to prevent injury to persons, duty of person keeping or using, 333
- Things in action not included in term "goods," 161
- Things personal. *See* "Personalty."
- Things real. *See* "Realty."
- Thirlage, customary right of, 747
- Threat
 declaration of intention induced by, revocable, 34
 of legal action, money paid or act done under, 317
 of proceedings for infringement of patent,
 action for damages and injunction in respect of, *bona fides* no defence to, 428 *n.*
 ground for damages and injunction, 426 *n.*, 427 *n.*
- Threats action. *See* "Design" and "Patent."
- Timber,
 cutting by mortgagee. *See* "Land, mortgage of, timber."
 not included in sale of copyhold land, 187 *n.*
 power to cut under Settled Land Acts, consent required, 888

INDEX

Timber—*contd.*

statutory power of tenant for life to cut, 879

Time,

- agreed, duty of borrower to restore thing lent within, 199
- calculating periods of, fraction of day not taken into account, 67
- calendar month, mode of reckoning in, 70
- comprised in, currency of period, 70
- condition as to, redemption of mortgage not prevented by, 49
- essence of contract, when, 49, 113, 148
- expiring on Sunday or holiday, act may be done on next business day, 68
- for action by personal representatives of deceased for damages suffered from death of deceased, 363
- for performance of contract, notice limiting, 148
- "half year" means six calendar months, 70
- leap year, 70
- legal day defined, 67
- lender of goods may demand return at any, 200
- means Greenwich mean time, 67 *n.*
- "month" construed as
 - lunar in legal matters, 69
 - calendar, when, 69
- of accomplishment of judicial act, 67
- of delivery of goods
 - in possession of third person, 169
 - where no time fixed in contract, 168
- of performance of contract,
 - when not fixed, 112
- performance of contract within fixed, 112
- priority of acts or events occurring on same day, 67
- reasonable,
 - common carrier must deliver goods within, 250—251
 - discharge of contract on failure to perform within, 148
 - duty of borrower of goods to restore thing lent within, 199
 - hirer must return thing hired within, when no time fixed for expiration of hiring, 196
 - what is a question of fact, 112, 148
- "six months" notice extends over two customary quarters, 70
- stipulations as to,
 - effect of unreasonable delay in fulfilment of, 49
 - when construed as conditions, 48, 49
 - when time essence of contract, presumed agreement as to, 48, 49
- Sunday included generally in period of, 68
- "twelve months" means twelve calendar months, 70
- when Act of Parliament becomes operative, 68
- year, 70

Tithe rent-charge,

- arrears, only two years' recoverable, 80, 848 *n.*
- definition, 731
- distress for, 733
- extraordinary, 734
- merger of, not presumed, 735
- owner liable for, 732
- recovery, method of, 80 *n.*, 732
- redemption of, 736
- remission of, by Court, 733

INDEX

- Tithes,
 commutation of, 732
 nature of, 731
 presumption of *modus* or release, 731
- Title,
 abstract of,
 delivery of, complete, 191
 verification of by vendor, 193
 commencement of, 193
 covenant for, implied from use of appropriate words, 189 *n.*
 deeds,
 carrier's liability in respect of, 252
 deposit of, as security, 206
 duty of vendor to hand over to purchaser on completion, 189
 retained by vendor, covenant or acknowledgment as to, 189
 right of purchaser to, on completion, 189
 defect in, disclosure of by vendor, 186
 express covenants for, not inserted, 189 *n.*
 finder may bring trespass against person without, 411
 good, what is, 193
 in contract of sale of land, implied warranty as to, 186
 of buyer of goods, on resale by unpaid seller, 179
 of finder of chattel, to maintain trover for, 424
 of plaintiff in action of detinue, 423
 relation back of, to date of conversion, sufficient to maintain trover, 417
 sort of, 194
 sufficient in action for ejectment, if possession for statutory period, 389 *n.*
 to goods, document, effect of transfer of, 178
 to land, duty of vendor to make and show good, 188, 193
 trespasser to land may justify trespass by setting up own, but not third party's, 384
- Toll (market). *See* "Fairs and markets."
- Toll (franchise). *See also* "Fairs and markets," "Ferry," etc.
 mill, 697 *n.*
 thorough, 696
 traverse, 697
 turn, 697
- Tort,
 act committing more than one,
 right of plaintiff to sue separately for each, 373
 separate rights of damages for, 373
 act or omission
 amounting to, may also be breach of contract, 336
 giving rise to action for, must be intentional or negligent, 329, 329 *n.*
 induced by malicious or improper motives, when amounting to, 335
 action of, assignment of,
 by liquidator of company, 365
 by trustee in bankruptcy to stranger, 365
 consent as defence to, 446 *n.*
 founded on negligence, will not succeed when damage caused by contributory negligence, 333
 in respect of act authorized by British Crown, not maintainable in England, by foreign State or alien, 340
 affecting
 business or property of corporation, action by corporation for, 346
 land situate out of England, action for not maintainable in England, 339

INDEX

Tort—*contd.*

affecting—*contd.*

- person or movables committed out of England, when action for maintainable in England, 339
- personal reputation of members, action by corporation not maintainable for, 346

ante-nuptial, of wife, liability of husband for, 58

apprehended, injunction to restrain, when granted, 374

no damages awarded for, 373

assignment of action of, 365

between husband and wife, 348, 349

by child, responsibility of parent for, 57, 58

by married woman, 28—29

liability in respect of, 29

of husband for, 57

by persons of unsound mind, liability for, 26, 347

by stranger in respect of common property, action by co-owner for, without joinder of other co-owners, 349

choice of remedies when act or omission amounting to, also breach of contract, 336

claim

arising out of contract cannot be converted into claim in, to make minor liable, 347 *n.*

under Lands Clauses Consolidation Act, 1845, not a claim to recover damages for, 366

committed in insulting manner, vindictive damages for, 370

conduct of person committing, high-handed and illegal, ground for injunction, 375

continuance or repetition of,

causing irreparable loss, ground for injunction, 374

interfering with proprietary right of plaintiff, ground for injunction, 374

continuing,

assessment of damages for, 372

fresh cause of action *de die in diem*, 372

damage caused by, must be "reasonable and probable" consequence of defendant's conduct, 327

damages,

bankrupt's right to recover, when passing to trustee, 366

in action of,

amount of, a question of fact, 369

estimate of, 371

measure of, 369

nominal or contemptuous, when awarded, 370

vindictive or exemplary, when awarded, 370

right to recover, cannot be transferred by voluntary assignment, 365

death of

party injured by, right of personal representative to sue on, 362

person committing,

action against personal representative when maintainable, 364, 365

extinguishment of liability by, 364

defence of statutory authority to action of, construction of powers on, 344

defendant asserting right to repeat or intention of repeating, ground for injunction, 375

defined, 326

deprivation of constitutional right, amounting to vindictive damages for, 370

INDEX

Tort—*contd.*

- feasors,
 - independent,
 - injunction against continuance or repetition of acts by, 337
 - separate liability for damages, 337
 - joint ('co'),
 - contribution amongst, 336, 337
 - judgment obtained against one, action against others barred by, 336
 - liability of each for whole loss suffered, 336
 - no right of contribution amongst, 270 *n.*
 - release of one by party injured, action against others barred by, 336
 - who are, 337
- felonious act may give rise to action of, 338
- fraudulent representation by minor, liability of, in, 347, 348
- husband cannot sue wife in, 348, 349
- injunction
 - for commission, continuance or repetition of, when granted, 374
 - for continuance or repetition of, when granted by way of interlocutory order, 375 *n.*
 - to prevent,
 - commission, continuance or repetition of, grounds for, 374—375
 - damages in lieu of,
 - when awarded by Court, 377
 - when not awarded, 378
 - mandatory,
 - by way of interlocutory order, when granted, 376 *n.*
 - definition, 376
 - prohibitory, 376
- in respect of
 - goods and chattels committed during life-time of deceased person, right of personal representative to sue on, 362
 - land, 405, 406
- joint and several liability of partners for, 270
- liability
 - for, discharge of,
 - by accord and satisfaction, 368, 368 *n.*
 - by release under seal, 368
 - for, extinguished by death of person injured, 362
 - in, cannot be transferred by voluntary assignment, 366
 - in, not extinguished by bankruptcy of wrongdoer, 367
 - of minor for, 25
- loss
 - arising from single, including prospective loss, must be recovered in same action, 372, 373
 - caused by present and continuous, ground for injunction, 375
 - malicious or high-handed conduct, vindictive damages for, 370
 - master's liability in, ascertainment of, 351
 - mental capacity essential to liability for, 347
 - minors liable for, 347
- negligence of
 - act of omission giving rise to action for, what amounts to, 329
 - trustees and executors, does not give rise to action of, 335 *n.*
- new loss amounting to new, 373
- of another, authorized or ratified
 - by corporation, liability for, 350
 - liability for, of agent, 350

INDEX

Tort—*contd.*

- of Colonial Governor, action for,
 - can be brought in Colonial or English Court, 341
 - defences available in, 341
- of coroner, in course of judicial duties, action for, not maintainable, 342 *n.*
- of Crown, no proceedings can be taken for, 340
- of foreign ruler, action for, when maintainable, 341
- of independent contractor, liability of employer for, 59
- of judge,
 - in judicial capacity, action for, not maintainable through malicious, 342
 - with inferior or limited jurisdiction, committed in excess of jurisdiction, liability for, 342
- of magistrate in course of judicial duties, action for, not maintainable, 342 *n.*
- of married woman,
 - committed before or during marriage, action for, maintainable without joinder of husband, 348
 - damages recovered against in action for, payable out of separate property, 348
- of minor,
 - by wrongful detention of goods under contract repudiated or determined, 347
 - indirectly connected with contract, 347
- of officers or servants of corporation, committed in course of employment, liability of corporation for, 346
- of partner, liability of firm for, 270, 356
- of public officials
 - committed by or with authority of Crown, liability to sue for in private capacity, 340
 - or subordinates, action against in representative capacity for, not maintainable, 340
- of servant,
 - after property of master out of danger, master not responsible for, 353
 - breaking connection with master, 353
 - committed in course of employment, liability of master for, 350, 351
 - of Crown, personal liability for, at common law, 341 *n.*
 - when committed for own ends, not within "course of employment," 353
 - whether master liable for, 58
 - with two masters, liability of one for, 352 *n.*
- of special agents, liability of employer to third parties, 59
- of subordinates of public officials, when public officials personally liable for, 340
- of trade union, action for, not maintainable, 344
- of wife, committed before and during marriage, liability of husband for, 356
- person committing, under control of another, evidence of, 351
- personal, right to sue on, remains in bankrupt, 367
- persons committing, without common design, several liability for damages, 337
- quasi-contract distinguished from, 315 *n.*
- reasonable apprehension of continuance or repetition of, injunction for, when granted, 374
- remedies of person injured by,
 - abatement, 369
 - account, 369
 - action for pecuniary damages, 369
 - distress, 369
 - penalties, 369
 - re-entry, 369
 - replevin, 369
 - restitution, 369

INDEX

Tort—*contd.*

- repetition of, necessitating incessant series of actions for prevention, ground for injunction, 375
- right to recover damages for, cannot be transferred by voluntary assignment, 365
- seduction or brutal conduct amounting to, vindictive damages for, 370
- to property, right of bankrupt to sue on, passes to trustee, 367
- waiver of,
 - in action for deprivation of services, 476
 - money or proceeds of goods obtained by force or fraud, 319

Trade,

- deception of public in matters of, illegal, 41
- unreasonable restraint of, illegal, 41

Trade competition, defence to action of conspiracy, 484

Trade dispute,

- defence to action, when, 478, 480, 485
- what is, 480 *n.*, 485

Trade mark,

- definition, 1024
- form of, 1024
- infringement of, injunction for, order for account obtained as ancillary to, 378
- invented word, 1025
- lapse of, 1025 *n.*
- own name, does not prevent use of, 1026
- registered, infringement of,
 - account in lieu of damages for, 426
 - damages for, 426
 - injunction to prevent, 426
- registration of, 1094
- registration, renewal of, 1025
- registration under Part B., 1025 *n.*
- removal of, from register, 1026
- rights of proprietor, 1025
- transfer of, 1027
- unregistered, 1027, 1028
 - protection of, 427 *n.*
- validity of, 1025 *n.*

Trade union,

- liability for wrongful acts of officers or servants, 6 *n.*
- torts of, action for, not maintainable, 344

Trading companies, dissolution of, 13 *n.*

Transfer of land, voluntary, trust not implied from, 1102 *n.*

Transfer of personalty, trust implied, when, 1102

Transit. *See also* "Carriage."

- deterioration of goods incident to, 171, 172

ended by

- acknowledgment of carrier that goods held as bailee or agent for buyer, 176
- delivery to buyer or agent before arrival of goods at appointed destination, 176

- wrongful refusal of carrier or bailee to deliver goods to buyer or agent, 177
- ended, notwithstanding further destination indicated to carrier by buyer, 177

goods in, and bill of lading, 943

- loss of, or damage to, goods during, 171

not ended

- by refusal of seller to receive goods back on rejection by buyer, 177
- when goods rejected by buyer and carrier continuing in possession, 177

INDEX

Transit—*contd.*

sea, risk as to goods during, 171
time when goods deemed to be in, 176

Treasure trove (franchise), definition, 697

Tree growing near boundary, ownership of, 779

Trees, overhanging branches of, may be cut by occupier of land, 84

Trespass,

action for false imprisonment is action of, 439 *n.*

action of,

defences to, 387

when consent to battery obtained by fraudulent misrepresentation, 433

annoyance, prejudice, or disturbance amounting to, no bar to action of nuisance, 391

appreciable damage in fact need not be proved in actions for, 326

by domestic animals, proper remedy for is action or distress, not destruction, 361

committed during life-time of deceased, action for, by personal representative, 410 *n.*

continuing, fresh right of action for from day to day, 372 *n.*

de bonis asportatis, 407 *n.*

injury to trespasser by defect in premises, liability for, 332

intentional or negligent harm not amounting to, liability in damages for, 445

lodger contracting for exclusive use of specific room may sue in, even against landlord, 382

occupier of land possessing certain and inclusive interest, alone can sue in, 382

on plaintiff's mines, injunction for, order for account obtained as ancillary to, 378

person receiving goods from trespasser, whether guilty of, 412

right to bring, whether carried by right to possession, 411 *n.*

to goods,

action of,

appreciable damage need not be proved in, 326

by bailor against bailee, when maintainable, 409

by bailor against third persons, 409

by executor or administrator, when maintainable, 410

by finder against person without title, 411

defences to, 411

by master when goods left in custody of servant, 408

by owner of franchise, 411

measure of damages in, 413

when plaintiff deprived of goods, 412

plaintiff must prove actual possession at time of interference, 407, 408

right to, barred by bringing of action of replevin, 413

when maintainable by assignee against third parties, 410 *n.*

defined, 407

person whose goods distrained for rent still deemed to be in possession for purposes of, 408 *n.*

seized by sheriff, action for, 410

servant acting inconsistently with possession of master, liable for, 408

to land

ab initio, 384

action of,

appreciable damage need not be proved in, 326

brought by person *de facto* in exclusive possession, 381

jus tertii as defence to, 384

INDEX

Trespass—*contd.*

to land—*contd.*

action of—*contd.*

- lies for interference with possession of sub-soil or minerals beneath surface, or air space incumbent, 381
- when maintainable by co-owners against each other, 387
- adjoining highways, by domestic animals, liability for, 358
- by dog, destruction of, for, when justified, 361
- domestic animal, liability of person keeping for damage caused by, 358
- entry in common inn, under authority of law, justifiable, 385
- landlord for demanding rent or levying distress, justifiable, 385
- reversioner to see if waste has been committed, justifiable, 385
- committed in lawful exercise of private easement or *profit à prendre*, justifiable, 386
- committed since accrual of title, action for, 384
- under licence of plaintiff, justifiable, 386
- defined, 380
- ejection of trespasser on, 382, 383
 - assault or battery justified on grounds of, 435
- in exercise of lawful custom, justifiable, 385
- in lawful execution of lawful process, justifiable, 385
- in occupation of tenant at will, who may sue in respect of, 382
- justified if committed under authority conferred by law, 385
- on what grounds justified, 385, 386
- remedy for, under old procedure, 380 *n.*
- situate out of England, action for, not maintainable in England, 339
- to abate a private nuisance, justifiable, 385
 - prevent commission of murder, justifiable, 385
 - prevent spread of fire, justifiable, 386
 - recover goods of defendant, when justifiable, 386
- trespasser cannot justify by setting up title in another, 384
- trespasser may justify by setting up title in himself, 384
- to person, claim for, barred by period of four years, 73

Trial,

- new, on unreasonable award of damages by jury, when ordered, 371, 372

Trover,

- action of, against bailee, for goods lost or stolen, whether maintainable, 420
 - mere wrong-doer, *jus tertii* no defence to, 420
 - purchaser of goods in market overt, 420 *n.*
 - third party, by person whose goods have been distrained for rent, 414 *n.*
- bona fides* no defence to, 418
- by bailor against bailee, *jus tertii* no defence to, 420, 421
 - bailor or bailee, when maintainable, 417
 - finder of chattel, 417
 - one co-owner of chattel against another, when maintainable, 418
- for sale of goods in market overt by co-owner, 418
- history of, 415 *n.*
- joinder of co-owners in, 349 *n.*
- jus tertii*, when defence to, 420, 421
- mere wrong-doer divested of possession cannot maintain, 418
- plaintiff relying on demand and refusal in, what must be proved by, 419 *n.*
- remedy for conversion of goods, 414
- right to possession of goods, necessary to maintain, 414, 414 *n.*
- "special property in goods" not sufficient to found, 414 *n.*

INDEX

Trover—*contd.*

- bailee may maintain, against bailor, when, 414 *n.*
- damages in action of, awarded in nature of interest above value of goods, 415 *n.*
 - measure of, when plaintiff not deprived of benefit of full value of goods, 414 *n.*
- judgment in, effect of, 421
- plaintiff in, entitled to specific recovery of goods, 421 *n.*
- possession of goods acquired lawfully or unlawfully immaterial for purposes of, 415
- term superseded by "conversion," 415 *n.*
- title relating back to date of conversion, sufficient to maintain, 417

Trust,

- animals, for, 1098
- bare, 1098 *n.*
- beneficial interest in, assignment of, 1152
 - successive alienations of, 1153
- beneficiary cannot enforce who owes money to, 1147
 - may pursue all remedies at once, 1147
- breach of, following the proceeds, 1141
 - following the property, 1141
 - impounding trustee's beneficial interest, 1143
 - liability of partner of trustee for, 271
 - order of claims on blended fund, 1142—1143
 - personal liability for, 1144
 - tracing proceeds of, 1142 *n.*
- charitable, no specific directions necessary, 1099
- constructive, 1099
 - when arising, 1103—1104
- created by matrimonial policy of insurance, 307
- definition, 1097
- descent of trustee's interest, 1148
- discretionary, 1098
- essentials of, 1097 *n.*
- express, 1099
- history of, 1097 *n.*
- imperfectly constituted, effect of, 1100, 1101
- implied, 1099, 1101—1103
- illegal, 1103 *n.*
 - when void, 1104
- Judicature Acts, effect on, 1097 *n.*
- lands, of, must be evidenced by writing, 1100
- modification of, 1112
- of property out of jurisdiction, 1105
- origin of, 749
- precatory, nature of, 1099
- property applied by trustee in partnership business, 271
- resulting, 1102
 - escheats to Crown, when, 1103
 - none from conditional gift, 1103 *n.*
- secret, effect of, 1100 *n.*
 - on co-legatees, 1100 *n.*
- technical words not necessary to create, 1099
- testamentary, must conform to Wills Act, 1100
- transfer of trustee's interest, 1148
 - on new appointment, 1148—1149
- vesting orders, 1150

INDEX

Trust—*contd.*

trustee's interest, no involuntary alienation of, 1149

Trust for sale, settlement of land by way of, 881

Trustee. *See also* "Judicial trustee."

accounts, must render, 1123

acting on power of attorney, not liable for death of maker, 1118

agent, when entitled to appoint, 1131—1132

alienation of trust property, no power of, 918, 919, 1126

appointment of, 1107—1108

attachment of, to make good default, 1144

audit of accounts of, may be required, 1123

authorized investments, what are, 1115

banker, not liable for default of, 1114

bankruptcy does not discharge from fraudulent breach of trust, 1146

beneficial interest of, liability of for breach of trust, 1152

breach of trust by, liability of partner of, 271

capital and income, costs, 1120

insurance premiums, 1119

rates, 1120

rent of leasehold, 1119

repairs, 1119

reversionary securities, 1120

wasting securities, 1120—1121

composition, acceptance of, by, 1133

contribution from co-trustees for breach of trust, 1139

convict, alienation by, 918

Court, appointment of, by, 1108

default of solicitor, not responsible for, 1113—1114

defect of title in investments, 1118

depreciatory conditions, sale under, 1128

devisee, may sell or mortgage, when, 1126

diligence required of, 1112—1113 *n.*

discharge of, 1108

discretion, must exercise, 1113

disentitled to benefits of statutes of limitation, when, 77

duty of, to follow settlement, 1098, 1112

expert advice, entitled to, 1113 *n.*

holds purchased land on trust for sale, 1126

impartiality, must observe, 1119—1122

indemnity

against beneficiary instigating breach of trust, 1139

by beneficiary, 325 *n.*

for moneys expended in preservation of trust, 324, 325

of, against co-trustee, 1139

of, out of property, 1138

personal claim for, against beneficiaries, 1138

insurance,

not bound to effect, 1119 *n.*

powers of, 1131

investment by, must exercise discretion, 1115

investments becoming unauthorized, 1116

leasing, power of, 1127

liability of,

for breach of trust, 325 *n.*

joint and several, 1144—1145

lunatic, may be removed, 1106 *n.*

INDEX

Trustee—*contd.*

- margin required on loan by, 1117
 - may be minor, 25
 - minerals, sale of, by, 1128—1129
 - minor of, power to advance, 1134
 - minor's land, accumulation of rents of, 1134 *n.*
 - management of, powers of, 1130
 - mortgage to renew leaseholds, 1127
 - negligence of, does not give rise to an action of tort, 335 *n.*
 - no one compelled to be, 1106
 - notice to, of assignment of beneficial interests, 1153—1154 *n.*
 - new,
 - powers of, 1136—1137
 - transfer of property on appointment of, 1109—1110
 - of goods, action of trespass maintainable by, though *cestui que trust* in occupation, 410
 - outstanding property, must get in, 1115
 - partner as, employing trust property in partnership, 271
 - partner may charge trust fund for services, 1124 *n.*
 - payment into Court by, 1113 *n.*
 - penalty for improper investments, 1122
 - personal profit, must not make, 1123
 - personal representative of deceased, not, 1106—1107 *n.*
 - power of sale, having, may sell in any way, 1127—1128
 - power to maintain minor out of rents, 1133—1134
 - powers, survivorship of, 1136
 - professional charges by, 1124
 - purchase of trust property by, 1125
 - "real securities," definition, 1116—1117
 - receipts by, 1132
 - release by one of, 158 *n.*
 - relief against honest breach of trust, 1146
 - renewal of lease by, 1124
 - repairs by, 1130
 - representatives of last surviving, may exercise powers, 1136
 - resignation of, 1109
 - sale or purchase by, without excluding restrictive provisions, 1129
 - security, irredeemable, may sell, 1126
 - speculation with trust funds, 1124
 - statutes of limitation, and, 1145
 - statutory exoneration of, 1114—1115
 - unauthorised securities, duty with regard to, 1122
 - wasting securities, and, 1120—1121
 - who may be, 1106
- Trustee Acts applicable to duties of personal representative, 1404
- Trustee *de son tort*, definition, 1107 *n.*
- Trustee in bankruptcy. *See* "Bankruptcy."
- Trustees for purposes of Settled Land Acts. *See* "Settled Land Acts, trustees."
- Trustee-vendor,
 - acknowledgment by, as to title deeds retained, 189
 - payment of purchase money to, 190 *n.*
 - receipt of, for purchase money, 190 *n.*
- Turbary, right of,
 - definition, 721
 - not in gross, 721

INDEX

- Undisclosed principal. *See* "Agent, undisclosed principal of."
- Undue influence,
 declaration of intention induced by, revocable, 34
 definition of, as affecting wills, 1258
 effect of, on validity of will, 1258
 not presumed between
 husband and wife, 36
 tenant for life and remainderman, 36
 mortgagee and mortgagor, 36
 onus of proof, 35, 36
 presumed, when, 35
- Unincorporated associations,
 administration of property of, may be enforced by, 5
 defined, 5 *n.*
 liability for wrongful acts of officers, 6, 521 *n.*
 personalty cannot be acquired by, 5
 property of,
 liable for wrongful acts of officers, 6, 6 *n.*
 protected by criminal law, 5
- University, powers under Settled Land Acts, 911
- Unliquidated damages, assignability of right to sue for, for past breaches, 141
- Usage
 as to delivery of goods by common carrier at consignee's address, 251 *n.*
 extension of lien of carrier, 260
 providing servant with food, 208 *n.*
 reasonable notice for determination of engagements, 212
 contract of service, duration of, fixed by, 211
 contract to pay interest on debt inferred from, 115
 implication of law under contract of sale negatived by, 182
 performance required by contract determined by, 105
 when partially impossible, 132
- Use and occupation, wrongful occupation of land does not give owner right to sue for, 319
- Use executed by statute, 749 *n.*
- Uses. *See* "Equitable interests in land."
- Valuables,
 consignor of, must declare nature of, 254 *n.*
 deposit of, with innkeeper for safe custody, 246
 entrusted to carrier,
 declaration of value of, 252
 increased charge for, 253
 notice in respect of, 253
 limit of liability in respect of, 252
 increased charges for carriage of,
 must be demanded by carrier, 254 *n.*
 receipt for, 254
 recovery of, 254, 255
 loss by carrier of, proof of value on, 255
 loss of, due to felonious acts of servants of common carrier, 255
- Valuation,
 agreement avoided in default of, damages for prevention of, 163
 in contract for sale of goods, 163
 price in contract of sale of land to be fixed on third party's, 185
- Vendor and Purchaser Act, provisions, trustee need not exclude, 1129

INDEX

- Vendor of land. *See also* "Sale of land."
- abstract of title must be delivered by, to purchaser, 193
 - conveyance by, of whole interest in land, implied in contract of sale, 186
 - defect in title to property, duty of, to disclose, 186
 - duty to
 - comply with all proper requisitions on title made by purchaser, 193
 - enter into proper covenants for title and other usual covenants, 189
 - execute and procure execution of proper conveyance, vesting legal and equitable ownership in purchaser, 188
 - give or tender possession to purchaser, 188
 - hand over all title deeds to purchaser, on completion, 188, 189
 - show and make good title to property agreed to be sold, 188
 - take reasonable care of property and pay outgoings until purchaser takes possession, 189
 - free from incumbrances implied in contract of sale, 186
 - good title,
 - implied condition and warranty in contract of sale, 185, 186
 - must be shown by, 193
 - implied undertakings of contract for sale do not arise, when, 187
 - money paid to, by insurer in respect of loss occurring after date of contract, 192
 - not trustee for purchaser of moneys recovered from insurers, 192 *n.*
 - preventing valuation to fix price, liable in damages, 185 *n.*
- Vendor of goodwill of partnership,
 - may carry on competing business after sale, 289
 - may not solicit customers of old business, 289
- Ventre sa mère*,
 - child in, and rule against perpetuities, 1073, 1074 *n.*
 - effect of, 661, 662 *n.*
- Verdict
 - of jury set aside by Court,
 - when influenced by prejudice or passion, 372
 - irrelevant matters considered, 371
 - material matters not considered, 371
 - result of mere compromise, 372
- Vesture, right of,
 - does not carry ownership of soil, 715 *n.*
 - nature of, 715
- Violation of proprietary right. *See* "Right."
- Vindictive damages. *See* "Damages."
- Vis major*, application of doctrine of, 453 *n.*
- Void title, entry under, effect of, 641
- Volenti non fit injuria*,
 - application of doctrine of, 446
 - where harm caused by breach of statutory duty, 446
 - defence of, open to employer under Employers' Liability Act, 450
 - defence to action of tort, 446 *n.*
- Voluntary conveyance, land, of, no resulting trust, 1103
- Voluntary expenditure, in preservation, improvement, or conduct of affairs of another, no indemnity for, 324, 325
- Volunteer, defined, 34 *n.*
 - intention may be revoked against, 34
- Wager,
 - contract by way of, void, 309
 - contract of, subscription for prize for lawful game is not, 311
 - gaming distinguished from, 309 *n.*
 - insurance by way of, void, 308

INDEX

Wager—contd.

- intention of party to, question for jury, 311, 312
- money
 - deposited, paid over in pursuance of, 310
 - paid on, not recoverable, 312
 - received by agent on, recoverable by principal, 312
 - won upon, action for recovery of, 309
- question for jury, whether contract is, 311, 312
- recovery by party to, of stake from stakeholder, 310
- securities deposited as "cover" by party to, recovery of, 310, 311
- stock exchange transaction as, 313

Wages. See also "Salary."

- apprentice not entitled to, 218
- attachment of
 - workman's, 226
 - secretary of company's, 226 *n.*
- current coin of the realm, payment of, in, 225
- deductions from, 225
 - of damages, awarded by Court to employer, 225 *n.*
- dismissal without payment of, when justified, 212, 213
- meaning of, 225 *n.*
- not agreed upon, reasonable reward for services rendered, 208
- periodical, not conclusive as to duration of contract of living and service, 211
- place of payment of, 226
- ranking of, in bankruptcy, 226, 227
- right of servant to, 208

Waif (franchise), definition, 698

Waiver

- of breach of conditions, by acceptance of part performance, 135
- breach of contract, effect of, 147
- condition, effect of, 794
 - in contract of sale, 163
- lien, unpaid seller on goods may be lost by, 175, 176
 - of unpaid seller by part delivery, 175

Wall, boundary, presumption as to ownership of, 780

Ward,

- chastisement of, assault or battery justified if committed by way of, 436
- restraint upon body of, by guardian, 440

Ward of Court,

- guardian appointed by Court, power of, over ward's property, 1232
- lands of,
 - leases by guardian in socage, 1232
 - leases of, by testamentary guardian, 1232
- marriage of, 1229
- minor as, 1229, 1230
- settlement on, 1230 *n.*

Warehouseman,

- common carrier retaining possession of goods as, 251
- lien, general, none, 963

Warrant,

- arrest without,
 - by private persons, statutory powers as to, 443, 444
 - for past demeanour, when justified, 437 *n.*
- under hand or seal of J.P., 343

Warranty, 147

- as to quality or fitness of goods when implied, 165

INDEX

Warranty—*contd.*

- breach of,
 - breach of condition treated as, 163
 - in contract of sale, 164
- buyer not entitled to reject goods on, 164
- by seller,
 - damages for, obtainable by buyer, 181, 182
 - measure of, 181, 182
 - set up in reduction of price, 181
- entitling to damages, 163, 164
- whether buyer entitled to reject goods on ground of, 181
- buyer to have peaceful possession, implied in contract of sale, 165
- distinguished from conditions in contract, 47
- goods sold shall be free from charge or encumbrance, implied in contract of sale, 165
- implied,
 - as to quality or fitness, by usage of trade, 166
 - in contract of sale of goods not negated by express warranty, 166
 - that vendor will make good title to property contracted to be sold, 185, 186
- of safety of vehicle, in carriage of passengers, 258
- of security, in carriage of passengers, 258
- of skill by servant, 209—210
- stipulation called, may be condition, 169

Warranty of authority,

- agent may be personally liable on, 61
- public officials not liable on, 61

Waste,

- action of,
 - against tenant by reversioner or remainderman, 405
 - who may bring, 576
- ameliorating,
 - definition of, 577
 - equitable remedies not granted against, 576
- buildings, and, 790
- copyhold, 594
- entry by reversioner in land to inspect, justifiable trespass, 385
- equitable,
 - definition, 784
 - forms of, 791—792
 - remedies against, 785, 787 *n.*
 - tenant for life and, 575
- fixtures, and, 788
- incorporeal hereditaments, of, 672 *n.*
- injunction for, order for account obtained as ancillary to, 378
- legal,
 - definition, 785
 - forms of, 789—791
 - tenant for life and, 575
- lessee for years, by, 625
- mines, and, 790
- ordinary wood, and, 789
- owner of executory interest and, 668
- permissive,
 - definition, 784
 - forms of, 791

INDEX

- Waste—*contd.*
 personal remedy for, 787
 ploughing up, and, 790
 reasonable user not, 787
 remaindermen, rights of, 668
 remedies open to reversioner or remainderman in respect of, 405, 405 *n.*
 severed articles, property in, 786
 tenant at sufferance, by, 764
 at will, by, 647
 for life, by, 576
 for years, by, 623, 625
 timber, and, 789
 voluntary, definition, 784
- Waste (manorial),
 improvement of, 689
 freehold in lord, 688
- Water;
 customary rights, 746
 kinds recognized, 709
 occupier's right to, 770, 771
 overflow of, on to plaintiff's land, a nuisance, 404
 percolating, limitation of, right to take, 403 *n.*
 occupier may take through land in undefined channels, 403 *n.*
 riparian proprietor's right to use of, 403 *n.*
 surface and other, included in land, 17
 underground, occupier's right to tap, 771
- Water supply,
 fouling or substantially diminishing, a nuisance, 402
- Waterworks,
 what minerals included in sale of land to undertakers of, 188
- Way, right of,
 bridle, 707
 carriage, 707
 change of character of dominant tenement, 708
 customary, 746
 defined, 706
 disturbance, what is, 707
 extent, 708
 foot, 708
 kinds of, 706
 need track be defined? 706
 repair, owner of servient tenement not bound to, 709
 underground, 706 *n.*
- Wearing apparel,
 distress, protected in, 972 *n.*
- Wharfinger,
 common carrier retaining possession of goods as, 251
 lien of, 961
- Widow. *See also* "Dower."
 claim to dower against adverse possessor, 1318 *n.*
 paraphernalia employed to pay husband's debts, remedy for, 1400
 receiving annuity out of profits, partnership not implied from, 264
 right of, to dower, 1318
 statutory claim on husband's property, 1317, 1318 *n.*
- Wife. *See also* "Married woman."
 action by against husband for protection of separate property, 349

INDEX

Wife—*contd.*

- bankruptcy proceedings against, 1185
 - loans by husband and, 1185
- cannot sue husband in tort, 348, 349
- chastisement of, no right of husband to, 437 *n.*
- copyright of, as joint author with husband, 1185
- funeral expenses of, 1182
- imprisonment of, by husband, when justified, 437 *n.*
- income of, 1183
- insurable interest of, in life of husband, 308
- insurance by, for benefit of husband or children, 307
- liability for husband's maintenance, 1182
- maintenance of, 1181
- of deceased, action by personal representatives for benefit of, 363
- power to dispose of property, 1315—1317
- restraint upon body of, by husband, when justified, 440, 441
- savings of, 1183
 - from separate property, 1183
- seduction of, action for, not maintainable by husband, 464
- status of,
 - after decree absolute, 1196
 - after judicial separation, 1196
- torts committed by, before and during marriage, liability of husband for, 356

- Wife, action for loss of,
- claims under Workmen's Compensation Act, 473
 - defences to, 471
 - "enticing," definition of, 470
 - founded on physical damage, 472
 - "harbouring," definition of, 470
 - loss of husband, probably no action for, 473
 - under Fatal Accidents Act, 473

Wild's Case, rule in, 562

Will. *See also* "Codicil."

- alien, of, 1243 *n.*
- alterations in, 1252
- beneficiary under, insufficiently described, 1262
- capacity to make, law governing, 1255
- confirmation of, 1240
- convict, of, 1256 *n.*
- death of testator caused by beneficiary, 1277
- documents incorporated in by reference, 1239
- election under, 1278, 1279
 - implied, 1280
 - married woman, 1280
 - terms of, 1279, 1280
- "foot or end" of, definition of, 1238 *n.*
- form of,
 - law governing, 1241
 - ordinary, 1237
 - when executed abroad, 1242
 - when executed in United Kingdom, 1242
- infants, of, 21, 1243, 1255
- intoxicated person, of, 1257
- joint, revocation of, 1246
- lost, 1251, 1252
- Married Women's Property Acts, effect of, 1256 *n.*

INDEX

Will—*contd.*

- person of unsound mind, of, may be valid, 26 *n.*
- property conveyed subsequent to execution of, effect of, 1251
- revival of,
 - effect of, 1254
 - revoked, 1253, 1254
- revocation of,
 - appointments revoked by, 1249
 - by alterations, 1248
 - destruction, 1248
 - marriage, 1246
 - "dependent relative revocation," 1249
 - formal, 1247
 - law governing, 1244 *n.*, 1245
 - power of, 1245
 - revokes codicils, 1251
- *sailor at sea, 1243, 1255
- signature to, 1237
 - seal not sufficient, 1238 *n.*
- soldier on active service, 1243, 1255
- soundness of mind necessary to execution of, 1256, 1257
- speaks from death of testator, 1261, 1262
- testamentary appointment, form of, 1241
- testator cannot delegate power to make, 1239
- testator, physical defects and illiteracy of, 1257
- testator's power to devise by, 1261
- undue influence, effect of, on validity, 1258
- witnesses to, 1237
 - competency of, 1259
 - presence of, 1238

Winding up

- of partnership business, 284
 - by Court, 285
- workmen's compensation, effect of, on, 461, 461 *n.*

Witnesses,

- marriage, 1157
- minors, 25
- will, of, 1237
 - competence of, 1259
 - knowledge of nature of document, 1238
 - presence of, 1238

Woman, seduced, action by, in respect of seduction, not maintainable, 464

Words, intention declared by, 32

Work,

- dangerous if badly done, liability of person authorising, 355
- defect in, effect of, on employer's liability to workman for injuries received in common employment, 447
- employer taking part in or interfering with performance of, effect on liability of, 354
- improper performance of, by independent contractor, 355
- injury suffered by pauper in course of, action for against Board of Guardians, 343, 344
- performance of particular, requiring reasonable care and skill, liability of employer for, 354, 355
- right to sue for, on default of one party to contract, 321
- unlawful, liability of employer, when, 354

INDEX

Work and labour. *See also* "Employer and employee."

- contract of,
 - defined, 221
 - duty of employee under, 222, 223
 - employer under, 222, 223, 224
 - extending beyond one year, must be in writing, 221—222
 - remuneration payable under, 221
 - right of employer under, 223, 224
- gratuitous promise to work creates no legal liability, 221

Workman. *See also* "Wages."

- alternative remedies of, in respect of personal injury, 451, 458, 459
- claim by, for accident occurring abroad, when maintainable, 459, 460
- compensation payable to, when services of lent or let to another person, 456
- damages
 - and compensation in respect of same injury not recoverable by, 458—459
 - recoverable under Employers' Liability Act, 451, 451 *n.*
 - under Employers' Liability Act paid to, effect of, 452
- definition of, 225, 449, 450, 486
- "dependants" of deceased, entitled to compensation, who are, 462
- employed by Crown, position of as regards compensation for injuries, 463
- false representation by, as to disease, 455
- injury to, caused by serious and wilful misconduct of, 455
- knowledge of defect or negligence causing injury to, effect of failure to give information of, 450
- penalty paid to, in respect of same injury, right of employer to credit in assessing damages under Employers' Liability Act, 1880. 452
- preferential claim of, in bankruptcy of employer, 461
- under Workmen's Compensation Act, who is, 457—458
- wages of. *See* "Wages."
- who is, 225
- for purposes of employer's liability, 449, 450

Workmen's Compensation Act,

- accident occurring abroad, claim in respect of, whether maintainable under, 459, 460
- alternative remedies of workman for compensation under, 458—459
- amount of compensation under, maximum, 462
- application of, outside United Kingdom, 463 *n.*
- assessment of compensation, 462
- bankruptcy of employer, 461, 461 *n.*
 - effect of, where liability under, insured, 461
- claim under,
 - based on industrial disease, employer liable for, 456
 - not extinguished by death of
 - person liable, 365
 - workman injured, 364
 - not sustainable, when defeated at common law or under Employers' Liability Act, 1880. 451
- contracting out of liability under, when claim barred by, 460
- Crown employees, position of under, 463
- "dependants" of deceased workman entitled to compensation under, who are, 462
- employer for purposes of, who may be, 456
- false declaration by workman as to disease suffered from, 455
- "industrial disease" under, 456 *n.*
- industrial diseases, in provisions as to, not applicable to seamen, 458 *n.*

INDEX

Workmen's Compensation Act—*contd.*

- injury,
 - agricultural work, 460
 - caused by serious and wilful misconduct of workmen, 455
 - causing death of party injured, liability under, 364
 - insurance of liability under, 461
 - bankruptcy of employer, effect of, 461
 - subrogation with regard to rights against insurer, 461
 - insurers, rights of workman against, 461
 - liability of employer under, 455
 - notice of accident
 - and claim condition precedent to action for compensation under, 459
 - under, time of, 459
 - in case of industrial diseases, 459 *n.*
 - want of or defect in, 459
 - personal representatives of deceased employer liable under, 456
 - person not deemed "workman" under, 457—458
 - principal of sub-contractor liable under, 460
 - services of workman lent or let to another person, employer liable under, 456
 - winding up, compensation a preferential claim in, 461, 461 *n.*
 - "workman" for purposes of, who is, 457—458
- Works, defect in, employer's liability for, 447
- Wounding, force employed in defence of possession of land or goods resulting in, 436
- Wreck (franchise), definition, 699
- Writ
- of assistance, 379 *n.*
 - delivery, 379 *n.*
 - habeas corpus*, person wrongfully imprisoned may avail himself of, 440 *n.*
 - possession, 379 *n.*
 - "*quod permittat prosternere*" to abate nuisance, 391 *n.*
 - summons is not judicial act, 67 *n.*
 - trespass *de bonis asportatis*, 407 *n.*
- Writing,
- absence of, when necessary, when a defence, 98—99
 - consideration of contract of guarantee need not be expressed in, 291
 - contract for work and labour extending beyond one year must be in, 221—222
 - contract of service extending beyond one year must be in, 207—208
 - contract unenforceable unless in, 86, 99
 - demand of payment in, interest from date of, 117
 - intention declared by, 32
 - necessity of,
 - in agreement to retire from partnership relating to land, 267 *n.*
 - in contract of guarantee, 291
 - in contract of insurance, 303, 304
 - in contract of partnership, 267
 - part performance of contract not in, effect of, 98—99
 - promise by executors or administrators to assess damages out of own estate
 - must be in, 97, 98
 - in consideration of marriage must be in, 97, 98
 - not to be performed within a year must be in, 97, 98
 - to answer for debt or default of another must be in, 97, 98
 - to transfer interest in land must be in, 97, 98
 - specialty contract requires, 96
 - sufficiency of note or memorandum in, 100, 101
 - under seal, effect of, want of, when requisite, 96
- Written instrument, alteration of, contract discharged by, 148, 149

INDEX

Wrongful dismissal,
 action for, defence of master in, 214
 damages for, 214

Year, calendar, 71

Yearly tenancy,
 commencement of, 617 *n.*
 creation of, 617, 618
 termination of, 619
 waste by tenant in, 625, 626 *n.*

